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2969

No. 15091

United States
Court of Appeals
for the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COM-
PANY, a corporation, Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, de-
ceased, Appellee.

Transcript of Record

(In Two Volumes)

VOLUME II.

(Pages 291 to 586, Inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED
SEP 11 1956

PAUL P. O'BRIEN, CLERK

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District of California, Central Division

RAYMOND C. SIMPSON

recalled as a witness on behalf of the defendant, having been previous duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

* * * * * [386]

Q. (By Mr. Gallagher): Mr. Simpson, do you recall the testimony given by Mr. John Hutchison which you read as part of plaintiff's case this morning, in which he said that on May 27, 1951, "We went aboard the Linfield Victory"?

A. I do.

Q. Do you recall that I asked you at that time whether you were the one who was talking to him and asking him the questions? A. I do.

Q. Now, did you go aboard the Linfield Victory with Mr. John Hutchison at that time?

A. Yes, I did. [387]

Mr. Simpson: The plaintiff rests, your Honor.

* * * * *

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

Mr. Gallagher: If your Honor please, the defendant respectfully moves the court for an order directing a verdict in favor of the defendant as to the first cause of action, upon the following grounds:

Number one, there is no evidence introduced by the plaintiff, direct or indirect, which would support a finding by the jury that Nathanael Patrick Hutch-

ison sustained either a fractured skull or a subdural hemorrhage in the course of his employment;

Number two, there is no evidence, direct or indirect, which would support a finding by the jury that any injury suffered by Nathanael Patrick Hutchison was proximately caused or proximately contributed to by any lack or omission on the part of the defendant to supply appliances in and about the ventilator shaft, to provide a reasonably safe place to work;

Number three, there is no evidence, direct or indirect, which would support a finding by the jury that at the precise time when Nathanael Patrick Hutchison sustained his fracture of the skull or sustained the injury to his brain, which resulted in the subdural hemorrhage, that the relationship of master and servant or employer and employee was in existence;

Number four, there is no evidence, direct or indirect, which would support a finding that at the precise time when Nathanael Patrick Hutchison suffered the fracture of the skull or the subdural hemorrhage he was acting in the course of his employment or in the performance of any duty pertaining to any employment, or in the doing of any matter or thing which was expressly or impliedly authorized by any contract of employment, or that he was doing anything which was reasonably incidental to anything required to be done by him in the actual course of employment;

Number five, upon the ground that to permit the jury to [393] render a verdict against the defend-

ant on the first cause of action would be to permit the jury to enter the realm of speculation with reference to questions of proximate cause, the question whether the relationship of employer and employee did or did not exist at the precise time of the sustaining of the injuries. And also speculation with respect to when any contract of employment terminated.

I call your Honor's attention in that respect to the averment in Paragraph VII of Plaintiff's amended complaint, first cause of action, as follows:

"That on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard said steamship as an able bodied seaman with deck maintenance duties."

And the answer of the defendant referable to Paragraph VII, which is as follows:

"Answering the averments in Paragraph VII defendant admits that from 8:00 a.m. until approximately 12:30 p.m. on the 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS 'Linfield Victory' as an able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing [394] deck maintenance duties or any deck maintenance duty.

"Except as hereinabove specifically admitted or alleged, denies the averments and each thereof in Paragraph VII."

We therefore have a consistent and direct issue

with reference to whether Nathanael Patrick Hutchison was an employee of the defendant at any time subsequent to 12:30 p.m. on April 24, 1951, and all the rest of the things they allege in that paragraph and which are not specifically admitted.

They have offered no evidence whatever in this case to show that Nathanael Patrick Hutchison was even on board the vessel on April 24, 1951, subsequent to the time he was observed by Kalnin coming out of the crew's mess hall, where he had evidently gone for a meal between 12:00 noon and 1:00 p.m.

There is no evidence in the case that anybody saw him anywhere on the vessel subsequent to that time. Therefore, there is no proof that on the 24th day of April he suffered any injury whatever.

There is no proof of the time when he suffered any injury, if he did, in fact, suffer one on April 24, 1951. There is no evidence whatever in this record with reference to anything that Nathanael Patrick Hutchison might or could have been doing on or about April 24, 1951, which would include back to the [395] time the vessel got to Baltimore and might continue on until the time the vessel left Baltimore. Not one word of testimony in here. So that those subjects are left entirely to speculation on the part of the jury.

Now, in the event that your Honor is influenced at all by the decision of the Supreme Court in the case of *Lavender v. Kurn*, which is cited in one of the plaintiff's proposed instructions.

Justice Murphy did say in that case that a meas-

ure of speculation and surmise is required whenever reasonable minds might differ with reference to the effect of uncontradicted evidence or which have conflicting evidence and may be true or reasonable inferences to be drawn or from uncontradicted evidence or conflicting evidence.

But in later cases the Supreme Court has reiterated the well established rule that speculation cannot take the place of probative facts. And if your Honor wants some more authority on that subject I will be very happy to give it to you.

I have cited the authority in support of defendant's proposed instructions. One particular case I have in mind is *Moore v. The Chesapeake & Ohio Railroad Company* in 85 Lawyers Edition, where the Supreme Court in a federal employer's liability case stated positively that speculation cannot do duty for probative facts.

Now, I appreciate the fact that your Honor is being [396] patient with me and I want you to bear with me a little more. Let's talk about Amundsen's deposition. That is part of their evidence.

Amundsen testified he saw Mr. Hutchison go toward the opening in the bulkhead down in the lower tween deck to get to the place where the ladder was, which went up the escape shaft. And he said he thought that was the last he saw of him.

However, on his further examination he said he couldn't be sure he didn't see him in the mess room during the noon hour.

Now, during the noon hour there is no work being done. There is no evidence here that there was any

duty to perform on the part of Nathanael Hutchison, no evidence that he had any reason whatsoever to go into the mast house, either go down the ladder or come up it during the noon hour.

Now, the only other testimony we have got is that of Mr. Kalnin, the only other direct testimony, and he said that Mr. Hutchison came up through that escape shaft ladder at about ten minutes to 12:00 and walked aft toward the crew's mess room.

My next ground is that, as a matter of law, the guard rails surrounding the ventilator shaft constituted a reasonably adequate safety appliance and was, as a matter of law, reasonably adequate to prevent any sober seaman in the full possession of his normal faculties from inadvertently falling [397] into or getting into the ventilator shaft.

My next ground is that the plaintiff has not offered evidence, direct or indirect, upon which the jury could find that the masthouse deck in the area around the ventilator shaft was a place of work. The most that can be said for the evidence is that the masthouse deck at its after portion and alongside the ladder, which goes down the escape shaft, were and each thereof was a means of getting to a place of work or, in other words, a passageway.

The only place of work mentioned in the evidence was down in the lower hold. I do not contend that the defendant was not required, as a general proposition—I am not speaking with reference to this case—but a ship owner is required to exercise reasonable care to furnish reasonably safe means of ingress to and egress from any place

where a seaman is required by the nature of his duties to perform actual work.

My next ground is that the plaintiff has failed to offer evidence, direct or indirect, which would support a finding that the defendant was guilty of actionable negligence in reference to any alleged neglect or failure to furnish—I would like to revise that—neglect or failure to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

Now, as a separate proposition, if your Honor please, and [398] not directed particularly for a motion for a directed verdict, I move the court to exclude from the consideration of the jury, in any event, the issue raised by the averments in Paragraph IX of the first amended complaint as follows:

“That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania.”

Said averments and each of them being denied in the answer of the defendant. And there is no evidence showing that he was found six days after he was injured.

There is no evidence here, direct or indirect, showing that he was injured on April 24th or April 23rd or April 25th, or at any time on or about April

24th, or at any time of the day or night he might have been injured on any of those days.

And there is no evidence showing that as a proximate result of any failure to find him before he was found he suffered death or came to his death.

Now, if your Honor please, that would constitute the motion for a directed verdict as to the first cause of action and the separate motion to exclude the alleged issue raised [399] by the averments of Paragraph IX from the consideration of a jury, in any event.

Now, with reference to the second cause of action, the defendant also separately and distinctly moves the court for a directed verdict upon each and every ground hereinabove set forth in the motion for a directed verdict as to the first cause of action.

Now, I want to do one thing more. You Honor will recall that, insofar as personal injury is concerned, the statute provided that:

“Any seaman who shall suffer personal injury in the course of his employment may at his election maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply.”

And the survival portion is found in the Federal Employers Liability Act, with which your Honor is well familiar.

Now, when we talk about statutes of the United States modifying or extending the common law

right or remedy, that language does not adopt all of the Federal Employers Liability Act or make all of the Federal Employers Liability Act applicable to a suit for damages by a seaman, who is injured in the course of his employment. [400]

It makes only those portions of the Federal Employers Liability Act, which actually modify or extend the theretofore existing common law right or remedy in cases of personal injury to railway employees immediately preceding the enactment of the Federal Employers Liability Act.

Now, what are those modifications? As applied to the pleadings in this case, the averments made by the plaintiff, her sole and only complaint of negligence, aside from what I have called your Honor's attention to, set forth in Paragraph XI of the first cause of action, is and must be predicated upon a contention that the defendant—pardon me, I would like to revise that.

That Nathanael Patrick Hutchison suffered personal injury in the cause of his employment and that he died as a result of such personal injury, and that such personal injury was caused or resulted, in whole or in part, by reason of an insufficiency due to the negligence of the defendant in and about its appliances in the masthouse.

I respectfully contend there is no substantial evidence here which would be sufficient to support a verdict in favor of the plaintiff, either with reference to the first cause of action or the second cause of action. And I again respectfully ask your Honor

to keep in mind the question of the relationship. Without that relationship being proved at the precise time of injury there is no possible basis for a cause of action because [401] of negligence or because they don't proceed under any Maryland alleged statute.

If they did contributory negligence would be a complete defense. They pin their entire case upon the Jones Act and an essential prerequisite to such a case going to a jury, regardless of all else, is evidence, direct or indirect, of the existence of the actual conventional relationship of employer and employee at the very time he suffers the injury which results in his death. There is no such evidence here.

The Court: What about the evidence on this matter of employer and employee relationship, Mr. Simpson?

Mr. Simpson: Your Honor, I would submit to the court there is certainly a fair inference from a number of factors.

One, that the ship's log shows concern regarding Hutchison as an employee, showing that he was reported missing on the 26th and an entry was made in the log at that time.

Secondly, that he was last seen by employees, that he was subsequently found dead aboard the ship.

To conclude, that he actually experienced those injuries during the scope of his employment.

Mr. Gallagher: The log, your Honor, shows he

was missing from noon time on the 24th. That is not entering him as an employee.

Mr. Simpson: The log's entry, your Honor, was made on the 26th. [402]

The Court: The only question I have is what establishes that he was an employee?

Mr. Simpson: I would submit, your Honor, that one of the decisions that Mr. Gallagher referred to, namely, the Lavender case, and said it was an old case——

Mr. Gallagher: I didn't say it was an old one.

Mr. Simpson: ——would aid us on that, because a more recent case is *Rex v. Pacific Atlantic Steamship Co.*, dealing with a similar question, where you had the problem of determining something from circumstantial evidence, and the court there expressly made it clear it is completely proper for a jury to engage in a measure of reasonable speculation if they can infer from the evidence before them that something is a fair inference.

I don't see from the evidence that is before the court, which I need not repeat, how any conclusion would be reached, other than that this man actually was aboard this ship and that his employment was not voluntarily terminated.

Mr. Gallagher: Well, the evidence is without conflict he didn't show up at 1:00 o'clock to go to work, which was his duty, if he were an employee.

Mr. Simpson: The evidence also shows, your Honor, that this man was missing, that no effort was made to find him, and quite conceivably dur-

ing the time when he was actually paid by the defendant, paid up until 12:00 of that day, that the [403] injuries might quite reasonably be inferred by the jury to have occurred before that time, which would mean he was an employee.

The Court: The court does not at this time rule respecting the Paragraph IX issue. All other motions are denied.

Now, do you wish to answer Mr. Gallagher on that issue tendered by Paragraph IX of the amended complaint?

Mr. Simpson: Yes, your Honor.

Mr. Gallagher: I think that is the one that disavowed, at the present time.

The Court: They did what?

Mr. Gallagher: Disavowed any claim of a cause of action for damages for death, by reason of a failure to search for him at the pretrial hearing.

Mr. Simpson: I have no such recollection, your Honor, and I don't think it would be reasonable to conclude we would file an amended complaint which expressly includes a paragraph setting that out, if we had disavowed it before.

But with respect to the specific claim asserted by Mr. Gallagher's contention, as I understand it is primarily directed to the fact that in the particular paragraph it is alleged, that "in said injured condition until four days after said fall, to wit, on the 30th day of April, 1951," and that as a practical matter there is no evidence in the record to show that whatever injury he might have received did occur six [404] days before April 30th.

I would submit that it is only a reasonable inference that the man, having been last seen on that particular day, that unless something could be established to show that this man had, in fact, left the ship and come back several days later and fallen into that ventilator shaft, that it is quite reasonable for the jury and the court to say that the injuries complained of occurred on the 24th.

And I would submit, not by way of evidence, but by way of the report that Mr. Gallagher gave us of the defendant stating the date of injury to be the 24th, that while you can't say it is a positive thing, it basically is a reasonable inference. In fact, it is the most reasonable inference that can be drawn from all the evidence, in that trying to determine another date for the injury, in light of the evidence we have before us here, would seem to be just a little bit simple, rather than proceeding upon this.

The Court: Defendant's motion with respect to the issue tendered by Paragraph IX of the first amended complaint is denied.

Mr. Gallagher: I am not going to try to get involved in any more argument, but I want the record to show I do not agree with Mr. Simpson's analysis of my reasons for the motion I made with reference to Paragraph IX. [405]

My motion was made on the grounds as I stated the motion, and I do not concede that Mr. Simpson's analysis of it is either correct or even simply correct. [406]

* * * * *

(Whereupon, at 3:30 o'clock p.m. Friday, October 7, 1955, an adjournment was taken to Tuesday, October 11, 1955, at 10:00 o'clock a.m.)

Tuesday, October 11, 1955, 9:55 a.m.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: At the request of counsel for the defendant in *Hutchison v. Pacific-Atlantic Steamship Co.*, the court now reconvenes in the absence of the jury.

What was overlooked, Mr. Gallagher?

Mr. Gallagher: Your Honor please, this has reference to Paragraph IX of the first cause of action and the first Amended Complaint, and also in the same Paragraph, adopted by reference thereto in the Second Cause of Action, that Paragraph reads as follows:

"That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, state of Pennsylvania."

Now, I move to dismiss that particular paragraph, if it is a cause of action, upon the following grounds:

No. 1, it does not aver facts sufficient to show that

the [411] plaintiff is entitled to relief;

No. 2, the cause of action, if any, for the survival part of this lawsuit is strictly statutory. The Jones Act adopts certain portions of the Federal Employer's Liability Act, and those portions are the parts which modify or extend the theretofore existing common law rights or remedies.

The defendant contends there is no legal duty imposed upon the defendant, pursuant to any part or portion of the Jones Act, or any part or portion of the Federal Employer's Liability Act adopted by reference thereto, to search for an injured seaman. And that the only possible cause of action would be one which might be referable to the claim for damages by reason of death.

In other words, if the master of the vessel knew that the man was injured and if the master of the vessel failed to exercise ordinary care to provide any and all reasonably required medical care and the man died, as a result of a negligent failure of the master to do that, then there might be facts sufficient to go to a jury with reference to that particular count.

In this case there is no evidence, direct or indirect, as to how long it would have required at Baltimore, Maryland, to get:

1, an ambulance to the place where the vessel was moored to the dock, or the distance between the nearest available [412] ambulance and the dock or the time it would have taken for the ambulance to get from wherever it was to the dock;

2, the time it would have required to get Mr.

Hutchison from the ventilator shaft to an ambulance;

3, the time it would take for an ambulance to get him to a hospital, actually having adequate and available operating room facilities;

4, that there was at the time a competent surgeon qualified to perform an operation and available for that purpose;

5, that at the precise time when such operation could have been commenced Nathanael Hutchison was still alive;

6, that the then effects of the fracture of the skull and subdural hemorrhage were not such as to have reached a point where an operation would be useless;

7, that at the end of such period of time, from the instant of injury to the precise time when a surgeon could have commenced an operation, Hutchison was actually alive and in such physical condition as to have made it reasonably probable that the operation would have saved his life;

8, there is no evidence, direct or indirect, that any employee of defendants, acting in the course of his employment, was guilty of negligence which proximately caused or proximately contributed to a failure to find Nathanael Patrick Hutchison between the time of injury and the time of death;

9, that any employee of defendant, acting in the course [413] of his employment, knew or should, in the exercise of ordinary care, have known that Nathanael Patrick Hutchison was actually at the

bottom of the ventilator shaft at any time when his death would have been avoided by taking all steps and doing all things which an ordinarily prudent person would have taken or done in an effort to save his life;

10, no legal duty was imposed upon the defendant, pursuant to the Jones Act or pursuant to any part of the Federal Employer's Liability Act, included within the Jones Act, to conduct any search for a seaman who fails to show up at the time fixed for resuming work or at any time while the vessel is tied to a dock. The only duty imposed by law is that when the master of a vessel knows or at most in the exercise of ordinary care should know that a seaman has actually sustained an injury requiring medical care and that such injury was sustained in the service of the ship, it then becomes his duty to exercise ordinary care in an effort to procure all reasonably necessary means of medical care for the benefit of such injured seaman.

An actual and negligent failure to perform this duty imposed by the general maritime law results in liability and damages to an injured and living seaman for any aggravation of the original injuries proximately resulting from such negligence on the part of the master, but the general maritime law does not, your Honor, furnish a remedy to anyone for [414] death of a seaman from any cause.

The first cause of action, if there is one, is exclusively statutory and is restricted to a recovery for conscious pain and suffering, if any.

A failure to search for an injured seaman would

not proximately cause conscious pain or suffering, in any event.

There is no——

The Court: Limit yourself, Mr. Gallagher, to stating your motion. Don't argue it.

Mr. Gallagher: Very well. My motion is three-fold.

The Court: I have heard your motion, unless there is some additional motion. I specifically asked you Friday when we sent the jury home, after having used it only 20 minutes, we came to midafternoon and you finished, I specifically asked you to finish all your motions then.

This motion is not timely made.

Is there anything further to the motion?

Mr. Gallagher: Only that I want to make sure I am moving for a directed verdict with reference to these matters contained in Paragraph IX upon all of the grounds heretofore stated.

The Court: There can be no doubt but that you have made that motion. It is denied. [415]

* * * * *

The Court: Bring in the jury.

For your information, counsel, the court will reject plaintiff's offered Instructions Nos. 6, 8, 9, 11, 12, 15, 17, 22, 23, 24, 25, 26, 27, and 30.

The court's present intention is to give defendant's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 17, 20, 21, 22, 25, 26, 27, 28, 29, 33, 37, 38, 45, 48, 54, 56, 61, 62, and 63. Those of the plaintiff's which I have not said were rejected will be given, and those of the defendant, which I have not said would be given are rejected.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Gallagher: Captain Dyer, will you take the stand, please?

HENRY C. DYER

called as witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your full name, sir? [474]

The Witness: Henry C. Dyer.

Direct Examination

Q. (By Mr. Gallagher): Where do you live?

A. 2967 Northwest Raleigh Street, Portland, Oregon.

Q. Are you employed by the defendant Pacific-Atlantic Steamship Co.?

A. I am marine superintendent.

Q. In your capacity as marine superintendent, will you tell us what you have charge of, in so far as the operation of vessels may be concerned?

A. Managing, storing, repairing and general navigation.

Q. Are you a master mariner? A. I am.

Q. For how long have you been fully licensed as a master mariner?

A. I believe it is 1926.

Q. Captain, are there any limitations on your license, with reference to either tonnage or oceans?

A. No.

(Testimony of Henry C. Dyer.)

Q. And that is what is called an unlimited master's license? A. Yes, unlimited. [475]

* * * * *

Q. (By Mr. Gallagher): Captain, are you familiar with the steamship Linfield Victory, or, were you, in 1951? A. Yes, sir.

Q. And do you know whether or not that vessel was owned by the United States of America, Department of Commerce, Maritime Administration?

A. It was.

Q. Do you know whether or not it was bare boat chartered to Pacific-Atlantic Steamship Co., including the period of the month of April, 1951?

A. It was, yes.

Q. Do you know whether or not that vessel instituted an intercoastal voyage on or about the 10th of March 1951, at Portland, Oregon?

A. I don't recall the date, but it was—she was in that regular trade.

Q. Do you know whether or not it was in the process or course of an intercoastal voyage at the time when it was in Baltimore, Maryland, in the month of April 1951? A. Yes, sir.

Q. Do you know whether or not that voyage ended at a [477] Pacific Coast port subsequent to the time it had been to the port of Baltimore, Maryland? A. Yes, sir.

Q. Now, in cases of that kind, are shipping articles required to be signed by the master and all members of the crew who are members of the crew for such a voyage? A. They are.

(Testimony of Henry C. Dyer.)

Q. In the course of your duties as marine superintendent, do accurate and certified copies of such shipping orders come to your attention and come to your desk? A. Yes, they do.

Q. I hand you a photostatic copy of shipping articles and ask you whether that document you have in your hand is a photostatic copy of regular intercoastal shipping articles involving the period I have mentioned?

A. Yes, sir, these articles are opened in Portland on the 10th of March 1951.

Q. When were they closed?

A. May 28, 1951, San Francisco.

Q. At a Pacific Coast port?

A. San Francisco.

Mr. Gallagher: I will offer the shipping articles as Defendant's Exhibit C.

The Court: The court will hold ruling in abeyance until counsel has had an opportunity to read them. [478]

If you can proceed to something else, do so, because those appear to be quite extensive and the print to be very small.

Mr. Gallagher: I might state to your Honor that the shipping articles are required to be in statutory form, and if it would aid counsel, he can see that statutory form in Volume 46, United States Code. It is printed in quite large type.

The Court: What is the number of the exhibit, so far as it has been marked for identification?

The Clerk: It will be Defendant's C.

(Testimony of Henry C. Dyer.)

The Court: Mark it as Defendant's C for identification, and we will rule on it after the recess.

(The document referred to was marked Defendant's Exhibit C for identification.)

Q. (By Mr. Gallagher): Captain Dyer, calling your attention to Plaintiff's Exhibit 4, a photograph, I direct your attention to this object which appears in the lower right-hand corner of the space just inside the open locker door, and ask you if you can tell what that object is.

A. That is a portable cargo light.

Q. Now, I call your attention to Plaintiff's Exhibit No. 7, a photograph, and to the object immediately below the arrow, identified as "E.O." Do you know what that is?

A. That is a marine outlet. It is an outlet for an [479] electric current for plugging in lights.

Q. In the event it is dark anyplace in a hold or in a masthouse, can a cargo light be used for the purpose of supplying artificial illumination?

A. That is their purpose.

Q. Is it the right of any member of the crew to take such a light and use it in case he desires to do so?

A. Yes. We have no restrictions on their use of the lights.

Q. Now, Captain, in the course of your duties as marine superintendent, did you have occasion to observe requisitions which might be made by the licensed officers of the vessel, in respect to equipment needed to bring up the ship's equipment to the

(Testimony of Henry C. Dyer.)

normal number of any particular article which might be carried on board?

A. I scrutinize and approve all deck department requisitions personally.

Q. Are those records part of the regular business records kept and maintained by Pacific-Atlantic Steamship Co.?

A. They are.

Mr. Gallagher: In an effort to avoid encumbering the record, if your Honor please, and if counsel has no objection, I will just refer to that one item.

Mr. Simpson: No objection. I think it should be marked. [480]

Mr. Gallagher: I will have it marked, then.

Q. (By Mr. Gallagher): Captain, I show you Requisition No. 1, dated March 9, 1951, and direct your attention to this particular item here under the words "on hand," and particularly with reference to the SS. Linfield Victory.

How many cargo lights were on hand on the vessel on that date?

A. Twenty-two.

Q. Were any additional ordered?

A. They ordered four.

Mr. Gallagher: Now, I will offer that in evidence, if your Honor please, as defendant's exhibit next in order, D.

The Court: Received.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Gallagher): Now, Captain, in the regular course of business, did the company procure

(Testimony of Henry C. Dyer.)

receipts from the master and chief mate of various articles delivered, as a result of requisitions?

A. Yes, they send in a copy of the purchase order and the vessel receipts, to show the delivery of those——

Q. Can you talk a little louder?

A. They send in a copy of the purchase order, send this to the ship and it is receipted for by the department head and the master, as being delivered. [481]

Q. And according to that, was that one of the regular business records of the company?

A. Yes.

Q. Does that show that these four lights, which are referred to in the requisition, were delivered to the vessel before the commencement of that voyage?

A. Those "4 only Lights, Cargo w/cable, Mogul Base."

Q. That is the same device referred to in the requisition? A. Yes.

Mr. Gallagher: I will offer that as Defendant's Exhibit E.

The Court: Received.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Gallagher): Now, Captain, have you been in masthouse No. 2 of the SS. Linfield Victory? A. Yes, sir.

Q. And have you been in the masthouse No. 2 of other Victory ships in addition to Linfield Victory? A. Many of them.

(Testimony of Henry C. Dyer.)

Q. How many ships did the Pacific-Atlantic Steamship Co. handle, in so far as shoreside business was concerned, for the United States Government?

A. I think we operated—we have operated, I think, [482] 37, 36 or 37 Victory type vessels, besides the six that we purchased outright.

Q. The ones you didn't purchase outright, did you operate one or more of them under a bare boat charter?

A. Yes, we had. I don't recall the number, but we had five or six under bare boat charter; more than that, probably.

Q. In so far as the others were concerned, were those operated by the Government under this G A agreement?

A. Yes, we had a general agency agreement for operation for the Government.

Q. And in those cases, where the Government retained the right to operate the ship and your company acted merely as general agent, did you go aboard any of those ships?

A. Oh, yes, I visited them frequently.

Q. Have you been present at any time while coastguard inspectors were inspecting Victory ships?

A. Quite frequently.

Q. And was that done in Portland?

A. Sometimes in Portland; sometimes Seattle.

Q. Have you seen it done both places?

A. Both places.

Q. Now, in the course of the inspections made

(Testimony of Henry C. Dyer.)

by the coastguard inspectors, do they go into these masthouses?

A. Their inspection includes the entire vessel.

Q. Does that—— [483]

A. In all cargo spaces and masthouses and— with the exception of the tanks.

Q. When you say “tanks”——

A. I mean the double-bottomed tanks or fuel oil tanks.

Q. Those aren't in the masthouse?

A. No, no.

Q. Now, Captain, in all of the Victory ships that you have seen, have you seen any with No. 2 masthouses, which were any different than the No. 2 masthouse as shown in these photographs taken of the Linfield Victory? A. No, I haven't.

Q. Now, with reference to these shafts, Captain, you see this picture here, Plaintiff's No. 1, where there is a plate which goes across the top of the sheet of steel, which separates these two shafts (indicating)? A. Yes.

Q. Now, you also see in these photographs, this picture No. 10, which shows a view down the ventilator shaft in No. 2 masthouse? A. Yes.

Q. Now, with reference to this screen down here at the bottom of that shaft, can you tell us what is on the other side of that screen? In other words, where does it lead to? A. The lower hold.

Q. In which hold? [484]

A. This would be No. 2 lower hold.

Q. No. 2 lower hold. Then that would be the

(Testimony of Henry C. Dyer.)

hold which is covered by the hatch covers immediately forward of the masthouse, as shown in Plaintiff's Exhibits 7 and 8?

A. That is right.

Q. This one here (indicating). Now, Captain, if a man were conscious and in the possession of his powers of perception and he shouted or yelled at that screen or into that screen, is there anything to obstruct the sound of the voice from permeating, going through, excepting the screen?

Mr. Simpson: I object to this question,——

Mr. Gallagher: Withdraw the question.

Mr. Simpson: ——as assuming facts not in evidence.

Mr. Gallagher: Withdraw the question.

The Court: It is withdrawn.

Q. (By Mr. Gallagher): Captain, if you cut out this screen here altogether (indicating), would there be any obstruction whatever between the bottom of the ventilator shaft and Hold No. 2?

A. Lower Hold No. 2, no, there wouldn't.

Q. Now, Captain, is there anything peculiar about the bulkhead or the sheet of steel which is the separation between the ventilator shaft and the escape shaft?

A. Well, I don't quite understand what you mean by "peculiar." [485]

It is one of the main watertight-strength bulkheads of the vessel.

Q. What I mean is this: Suppose you were down there and you took off your shoe and you

(Testimony of Henry C. Dyer.)

banged the heel of the shoe against the side of that steel, would there be any different kind of sound that would come from it than you would expect from any ordinary kind of sheet steel?

A. It would carry quite a distance. You could certainly hear it.

Q. It would make an audible noise?

A. Yes.

Q. Now, Captain, there has been some testimony here by the boatswain to the effect that he was standing—withdraw that.

To the effect that the after portion of Hatch No. 3 was uncovered on April 24, 1951, at the time when Mr. Hutchison and other men were working down there in the lower tween deck, in Hold No. 3, and that the winches were being operated to take out dirt slings.

Now, under those circumstances, Captain, where does the man operating the winches stand?

Would he be back here at the winches, immediately aft of Masthouse No. 2, or would he be at the winches at the—immediately at the after end of Hatch No. 3?

A. He would be on the after end of Hatch No. 3 facing [486] the masthouse.

Q. Facing Masthouse No. 2? A. Yes.

Q. Does the expression “standing at the winches” have any special significance with reference to cargo vessels of this kind? If a man says, “I am standing by the winches” what does that mean?

(Testimony of Henry C. Dyer.)

A. It means he would be standing by the throttles of the winches. There are two winches, operated by one man.

Q. So he would be——

A. Controls would be together in the center of the hatch.

Q. He would be operating the winches then?

A. Yes.

Q. If a man is standing at the winches, at the after end of the Hatch No. 3, you say he would be facing forward? A. Yes.

Q. Would the entire deck forward of the after end of Hatch No. 3 be visible to him?

A. Yes.

Q. And would these, would the door to the masthouse, that portion of the masthouse containing the ventilator shaft and the escape shaft, also be visible to such a man? A. Yes, it would.

Q. Would a man walking on deck and approaching the [487] door to that masthouse be visible to the individual who is standing at the winches?

A. Yes, he would.

Q. Now, Captain, have you been on board the Linfield Victory recently?

A. I was on board about the middle of July, or middle of August, rather.

Q. Where was that?

A. In San Francisco, or Oakland, rather.

Q. Where was the vessel docked at that time?

A. At the Oakland Army Base.

(Testimony of Henry C. Dyer.)

Q. Is the United States now operating that ship itself? A. She is.

Q. Is your company acting as general agent for it?

A. We are acting as general agent for it.

Q. Captain, did you go in the Masthouse No. 2 on the occasion in the middle of August, when you were up there in Oakland? A. Yes, I did.

Q. Was the inside of the masthouse any different in the slightest particular than indicated in these photographs on the board? So far as the physical appearance is concerned.

A. No, the same as it was from the time we took delivery of her.

Q. Has that vessel been inspected by coastguard [488] inspectors since April 1951?

A. Oh, yes.

Q. At the regular annual inspection?

A. At the regular annual inspection. Of course, while she was laid up, while she was in fleet reserve they wouldn't hold the inspections, but she was reinspected when we took her out early this year.

Q. Now, Captain, when the—withdraw that.

When you walk down or climb down this ladder, where Mr. Wise appears in Plaintiff's Exhibit No. 1, and you want to go into the deck immediately below the main deck, or the deck immediately below the last one I mentioned, to wit, two decks below the main deck, how do you get from the ladder into the hold?

(Testimony of Henry C. Dyer.)

A. There is a door opening at the side.

Q. That is, a man who goes down there would step on a plate at the particular deck level he would want?

A. Yes.

Q. There is a door, then, that opens, and you walk into the particular hold, is that correct?

A. That is correct.

Q. Now, Captain, was the after section of Hatch No. 3 open on the day when you examined the Linfield Victory in the middle of August 1955, at Oakland?

A. I believe it was, yes, sir. [489]

Q. And was the vessel, so far as the hatches were concerned, in the same general condition as they were in 1951? I mean the physical layout.

A. Oh, yes, the physical layout.

Q. The hatches were the same?

A. Same hatches.

Q. And the size of the holds, and so forth?

A. Yes.

Q. On that deck, when you were aboard, you say you went into Masthouse No. 2. With the after section of Hatch No. 3 removed, could you see any light coming through the door openings, that you have referred to, leading from the lower holds into that escape ladder shaft?

A. I could.

Q. Now, Captain, on the day when you examined the Linfield Victory, did it have these ventilator cowls on the masthouse (indicating)?

A. Yes, they were on there.

(Testimony of Henry C. Dyer.)

Q. Did you go inside the Masthouse No. 2?

A. Yes, I did.

Q. Did you close the door? A. I did.

Q. Did you lock it? A. Dogged it down.

Q. Can that masthouse door be dogged or undogged either [490] from the outside or the inside?

A. Yes, it can.

The Court: I think that term might well be explained.

Mr. Gallagher: All right, your Honor, thank you.

Q. By Mr. Gallagher: When you say "dog it," will you explain it with reference to Plaintiff's Exhibit No. 5? What do you mean when you say "dog" a door down?

His Honor would like to know.

A. These objects here are dogs (indicating). They are swinging contraptions that fit against a wedge shape on the door. When you dog it down, you swing that in and jam it on the edge, which pulls the door against the gasket and makes it water-tight. The door will have six dogs on it.

Q. In other words, a dog is just an iron rod which is hinged or swiveled at one end?

A. Yes.

Q. And just take hold of it and pull it down, and it goes against a wedge-shaped piece of metal and that pressure pushes the door closed, so that it is water-tight? A. That is correct.

Q. That operation, you say, can be done either from the inside or the outside?

A. That is right.

(Testimony of Henry C. Dyer.)

Q. Now, Captain, you say you went in there and dogged that portion of Masthouse No. 2 containing the ventilator [491] shaft, and the escape shaft referred to in these photographs sometime in the middle of August 1955? A. That is right.

Q. What kind of day was it?

A. It was a clear day.

Q. Now, Captain, when you went inside, with the door closed, was there any light which came in through the ventilator cowl?

A. Yes, it was——

Q. How much light?

A. It was quite light. I don't know how to describe how much light was there. There was ample to see your way around.

Q. Could you see the stanchion and the pipe railings? A. Oh, yes.

Q. Could you see the ladder?

A. You could see the ladder.

Q. Could you see there were two shafts there?

A. Very plainly.

Q. Now, did you also go inside the masthouse with the door open? A. Yes.

Q. And what was the condition of visibility in there with reference to whether you could or could not read ordinary newspaper print? [492]

A. Well, I believe that I could have read print inside as well as out, provided I had my glasses.

Q. Now, that ship, you say, was operated by the Government? A. Yes.

Q. So that all of these things you testified to

(Testimony of Henry C. Dyer.)

have reference to physical things you say you observed when you went in that masthouse?

A. That is right.

Q. And you understand, of course, that if you have testified to anything which is not true, it would be a very simple matter for the proper authorities to check up on you by going into the masthouse themselves?

A. That is quite true.

Q. You realize that your testimony about the condition of visibility inside that masthouse relates to a material fact in this case?

A. That is true.

Q. Captain, in April 1951, was there any custom of any kind or character with reference to searching a ship for a man, not on articles, who fails to show up at the appointed time for his job, when the ship is tied up at a dock in any city in the United States? A. Not that I know of.

Q. Did you ever hear of any such thing? [493]

A. No.

Q. When seamen are not on articles, can they quit any time they want to? A. Yes.

Q. They just walk off and say nothing?

A. Well, they come back to claim their pay. But that is quite often what happens. They will just walk off and come back later, or come back to the office and claim their pay.

The Court: What are the conditions under which seamen work without articles?

The Witness: When a vessel is operating coast-

(Testimony of Henry C. Dyer.)

wise, that is, you have a portion of the voyage on both coasts, where we are not compelled by the statute to put them on articles and where, for our own convenience and the men's convenience, we keep them just on what we call coastwise articles, which just means a listing of the men employed.

And that is like—we may have some men, that might go to the hospital in New York, and we have to have a replacement there. In an intercoastal voyage, she would go to Baltimore and Philadelphia, and then sail for the Canal, and chances are we wouldn't put the man on articles until just prior to sailing for the Canal, for the simple reason if he was unsatisfactory, an unsatisfactory employee, we could get rid of him without any trouble; where, if he didn't like it, he could quit anytime.

The Court: In the meantime, until one side or the other became dissatisfied, he would work?

The Witness: Yes.

Q. (By Mr. Gallagher): Now, Captain, I am calling your attention to Plaintiff's Exhibit 15 in this case, and in particular to the log entries under date of Tuesday, April 24, 1951, and down here it says, "1715 Olive Kupau, A. B. Reported for duty."

What does 1715 mean to landlubbers?

A. 5:15 p.m.

Q. 5:15 p.m. So that at 5:15 p.m. on that day an able-bodied seaman named Kupau reported for duty?

A. That is right. [495]

* * * * *

(Testimony of Henry C. Dyer.)

Q. (By Mr. Gallagher): Captain, it appears here in the record that Ernest Kalmin, the boatswain, gave testimony at an investigating unit of the United States Coastguard at Philadelphia on May 1, 1951.

I would like to ask you, Captain, whether that is the same branch of the Government I am talking about, the Coastguard, the same branch of the Government of the United States as conducts the inspection and certification of vessels of the type of the Linfield Victory. A. That is correct.

Q. With reference to these other Victory ships that your company owns and which it has operated under bare boat charters, and with reference to which it has acted as general agent for the United States of America, were each and every one of those ships inspected and was a regular certificate of inspection issued for each and every one of them by the Coastguard? A. Yes, sir.

Q. Did all of those inspections occur at either Portland or Seattle, or were they inspected at times throughout the United States?

A. Oh, they were inspected at times throughout the [496] United States, wherever——

Q. So there would be many different inspectors who inspected and passed these vessels?

A. Wherever the certificate expires, there you have to have—the first American port, has to be inspected.

Mr. Gallagher: Take the witness.

(Testimony of Henry C. Dyer.)

Cross Examination

Q. (By Mr. Simpson): Captain, have you ever tried to read a newspaper in that masthouse, even with your glasses? A. No, I haven't.

Q. Directing your attention to Plaintiff's No. 4, I am going to ask you to step down and point something out to the jury, if you will.

I call your attention to Plaintiff's No. 4, which has been identified as the starboard side of the masthouse of the Linfield Victory, and I ask you if you can tell me what this is starting up here, Captain (indicating).

A. That is a reel for a heavy lift——

Q. I misled you. I mean from the very top.

A. This is a cowl for the starboard ventilator shaft.

Q. As the ventilator shaft goes down, how far does it go down in the Linfield Victory?

A. Down to the lower hold.

Q. The same as the one on the port side? [497]

A. The same.

Q. Looking in here is there something which blocks that off or not?

A. Yes; bulkhead. This shaft is not like this one here (indicating).

Q. Plaintiff's No. 1.

A. This is not available from this end—starboard shaft is not available.

Q. Captain, in your experience have you ever at any time seen a screen or a grate of any kind over a ventilator shaft on a Victory ship?

(Testimony of Henry C. Dyer.)

A. Do you mean over the head of the shaft or over——

Q. Yes.

A. No. You have on the outside where they put anti-bomb screens on during the war.

Q. Have you ever seen them on any other kind of ships? A. No.

Mr. Gallagher: Your Honor, I think maybe there is a little uncertainty. He says on the outside. I think he should point out what he is referring to.

The Witness: Screens on the outside.

The Court: If you are not satisfied with this interrogation, you can clear it up on redirect.

Mr. Gallagher: The picture shows screens on the outside, your Honor, right there (indicating).

The Court: Let Mr. Simpson conduct his case and you conduct yours.

Q. (By Mr. Simpson): Captain, in referring to Plaintiff's Exhibit No. 4, the masthouse on the starboard side, you pointed out a cargo light, is that not correct?

A. I don't remember the names. Which is Plaintiff's No. 4?

Q. This is Plaintiff's No. 4, Captain (indicating). A. Yes, that is a cargo light.

The Court: I think you might have him stand so that the jury can see.

The Witness: I am sorry.

Q. (By Mr. Simpson): This object——

A. That particular object there is a cargo light, a portable cargo light.

(Testimony of Henry C. Dyer.)

Q. If a seaman wanted to use a portable light in Masthouse No. 2 on the port side, where would he connect it?

A. He would connect it at this outlet (indicating).

Q. You are referring to Plaintiff's No. 7?

A. Yes, this outlet right here (indicating), just inside this——

Q. This place marked on Plaintiff's No. 7 as "Electrical outlet"? A. Yes.

Q. Now, you have mentioned that these particular doors [499] were dogged down? A. Yes.

Q. When you went in—are these dogged at the present time, these you examined here (indicating)?

A. Yes, these are dogged (indicating).

Q. If a person wanted to use this light inside of Masthouse No. 2 on the port side, could he close that door and have a cord go through that dogged door? A. Oh, no.

Q. A last question, Captain: When you were in Masthouse No. 2 on the Linfield Victory, with the door closed, was the light on the inside the same as the light out on the deck, without a covering?

A. You mean was——

Q. Was the illumination as bright?

A. Oh, no, naturally, it couldn't be.

Q. With the door open, was it as bright?

A. No.

Mr. Simpson: No further questions.

(Testimony of Henry C. Dyer.)

Redirect Examination

Q. (By Mr. Gallagher): Captain, just one or two further questions. Was there any way for any seaman or anybody else to get into that portion of Masthouse No. 2 where the ventilator shaft and the escape shaft were located, from the main deck, without opening [500] the door and walking through it?

A. From the main deck?

Q. From the main deck.

A. No, that is the only access.

Q. Now, on these Victory ships, are there ladders at the forward hatch coaming and the after hatch coaming of Hatch No. 3?

A. Yes, there are.

Q. Would it be possible for a man to go from the deck down such a ladder to a lower hold, and then walk through the door at the forward bulkhead of Hold No. 3, and go from there up the ladder?

A. Yes, perfectly——

Q. In the escape shaft.

A. Yes, he could come down one way and go up the other; yes.

Q. And if he came up this ladder, would there be any way he could yet out of the masthouse, excepting either walk through an open door or open the door and walk out (indicating)?

A. That is the only way.

Q. Now, you mentioned something about screens on the outside. Captain, I call your attention to the Plaintiff's Exhibits Nos. 7 and 8.

(Testimony of Henry C. Dyer.)

What are these objects here at the upper portion of the [501] ventilator cowl (indicating).

A. Those are ventilator cowls with screens.

Q. Are those the screens you referred to, which are placed over the ventilator on the outside?

A. That is what I was talking about, yes. [502]

* * * * *

Wednesday, October 12, 1955; 10:00 a.m.

The Court: Good morning.

The jury and parties being present, proceed.

Mr. Gallagher: Your Honor, at this time I request the court to receive and have marked as an exhibit the Shipping Articles, which were marked for identification yesterday.

Mr. Simpson: Your Honor, the plaintiff objects to the admissibility of them on the ground that they are in no way revelant to any issue contained in the pleadings, and that they in no way establish any issue respecting liability or damages, and for that reason are both immaterial and incompetent.

Mr. Gallagher: May I reply to that?

The Court: No, you don't need to. The objection you have, Mr. Simpson, goes to the weight rather than the admissibility. I think the door must be open for them and the weight is something which both you and Mr. Gallagher may argue to the jury, and it will be for the jury to decide.

So that the Shipping Articles are admitted.

The Clerk: Defendant's C.

(The document previously marked Defendant's C for identification was received in evidence.) [507]

* * * * *

The Court: While you are all here, I read to myself last night the instructions, reading them slowly as I would if I were giving them to the jury.

Mr. Gallagher: That is about 250 words a minute.

The Court: They are tremendously long and each of you have given a lot of B.A.J.I., with what you call adaptations. The adaptations in each case partake somewhat of the nature of advocacy, and I think that the court will reject all instructions which are offered.

Now, I don't mean by that I might not give some, but I am just putting you on notice, I don't promise to give any instructions which either of you have offered, because going over them all and seeing the context of those I had selected to give, there are so many adaptations that I don't think should be in the charge, and I will undertake to base the charge on B.A.J.I. and read the B.A.J.I. instructions.

I am just telling you that now so you will not be misled into thinking I am going to read verbatim any instruction which you have offered and base any argument upon the text of it. [570]

Mr. Gallagher: I request that the court inform us, particularly me, specifically of its action with reference to all of the proposed instructions which have been submitted to the court on behalf of the

defendant, and all of the instructions which have been submitted to the court on behalf of the plaintiff, because when this jury is instructed, and before it commences deliberation, I anticipate that it will be necessary to state exceptions to the charge as given, and to the refusals to charge.

It will obviously take me a much longer time if your Honor instructs the jury orally, without reference to any of the written requests, because under those circumstances I will have to have the reporter check with me as to the exact language used by the court, so that my exceptions will be referable to points of law which I desire to state.

And I respectfully contend that the court must, upon request, specifically advise counsel with reference to its action as to each proposed instruction, whether it will or will not give the same. If it does not intend to give the same as requested, how much of the same it intends to give.

If it intends to reject the whole, that we be advised of that fact.

The Court: The proposed instructions for the defendant are so long that they have overworked the privilege of counsel to submit instructions. You know, from your years here, [571] it is the custom of the judges to give generally the B.A.J.I. instructions in these cases. And I think counsel should submit a modest number of instructions on special charges, but you have gone into argument. There are over a hundred pages of instructions, of these long 32-line foolscap, and it will just put too much of a burden on a judge and result in too long a

delay to go through and settle all of them with finality in advance. You are going to have to live with the instructions as given.

I will try to cover everything and I will give much of what you have requested, but not in long and argumentative language.

Mr. Gallagher: Well, of course, your Honor is entitled to form the opinion they are argumentative. I respectfully differ. I don't think they are argumentative.

I prepared these carefully and I want to call your Honor's attention to something that we discussed yesterday. When I said that Mr. Simpson, as counsel for the plaintiff, had disavowed any cause of action with reference to damages for death, based upon the allegations of Paragraph IX, I was correct.

During the last trial your Honor so stated and I have got the transcript where it occurred.

The Court: That trial is finished and done. Now, at that trial, however, I think at the outset I read the complaint. [572] And you took great exception to it. At this time you admonished me you would take exception if I read the complaint.

Now, I find throughout your instructions continual reference to the complaint and to the absence of proof upon certain things.

We are done with this colloquy. We will proceed to take further evidence or argument, as you wish. If you aren't in a position to start arguing today, we will put it over until tomorrow. I won't rush

you. I am not going to spend endless time here in debate.

Mr. Gallagher: I would prefer to have an adjournment at this time. The defendant will rest.

Mr. Simpson: I would——

The Court: You have rested?

Mr. Simpson: I have rested.

The Court: You have rested?

Mr. Gallagher: Yes, your Honor.

The Court: It is then a matter for argument.

* * * * *

The Court: The court convenes in the absence of the jury. I will hear any motions which are made.

Mr. Gallagher: If your Honor please, the defendant moves the court for an order striking from the testimony of Captain Crawford all testimony which he gave with reference to an alleged custom of searching for missing members of the crew or absent members of the crew, and his conclusions and opinions with reference to what part of a ship should be searched, upon the following grounds:

With reference to the alleged custom, none of said evidence was competent, and none of it was relevant.

The captain himself stated that it was based solely, in so far as 1951 was concerned, upon what he had read in books [575] and what he was told, to wit, hearsay.

Now, so far as what parts of a ship should be searched when a seaman not on Articles is miss-

ing or absent from work is concerned, that stated a pure, unadulterated conclusion of the captain.

Furthermore, the next ground is there is no evidence of any kind or character, no testimony given by Captain Crawford with reference to the existence of any such custom at Baltimore, Maryland, in April 1951, and no reference to any such custom pertaining to the particular vessel, to wit, the Linfield Victory.

I also move to strike out Captain Crawford's testimony that he has observed heavy screens located where the pipe railings are located in Plaintiff's Exhibits Nos. 1, 2 and 3, upon the ground that there is no evidence showing that it amounted to a custom or that the conditions were substantially similar, or that it amounted to any more than a single instance of what he had observed some individual shipowner may have done.

Those are the motions to strike, so far as Captain Crawford is concerned.

The Court: Denied.

Mr. Gallagher: Now, the defendant moves for a directed verdict with reference to the claim set forth in the so-called first cause of action, in Paragraph IX, upon the [576] following grounds:

1. There was no legal duty imposed by the Jones Act or any modification or extension of the common law rights or remedy available to railway employees to search for or discover an injured seaman;

2. The so-called survival cause of action, which is set forth in the first so-called cause of action, is

purely statutory and the sole and only basis of any possible recovery would be, in so far as damage is concerned, proof of conscious pain and suffering. And there is no proof here with reference to that cause of action, showing that if he had been searched for or if he had been found conscious pain or suffering would, in all probability, have been avoided.

The Court: The court granted such a motion when this case was tried before and was reversed on it.

Mr. Gallagher: Not that motion. Your Honor granted a motion for a directed verdict with reference to the first cause of action, in so far as it had to do with a recovery by the widow of damages for the conscious pain and suffering of the deceased.

But there is no legal duty imposed upon the owner of a ship to search for or find a seaman who is missing or absent from his job, when the ship is tied up at a dock in any city in the United States.

The Court: I can't conceive that if the Circuit Court [577] felt that to be the case they would have reversed it and ordered a new trial, when the new trial upon substantially the same evidence on that cause of action would be something which must result in judgment for the defendant.

They just don't reverse unless they think that the new trial is possibly—that if a judgment goes the other way on the new trial it would be possibly sustainable, at least, upon the legal theory.

Mr. Gallagher: The evidence is different, if your

Honor please. I don't expect you to agree with me, but I contend the evidence is different in this record than it was in the first record.

The Court: Of course, there are many areas that we have not touched on in this case that were in the other, but I think the evidence as to the first cause of action is sufficient to pose a jury question, and the motion is denied.

Mr. Gallagher: There is another cause of action set forth in the first cause of action, or another claim. That is the claim predicated upon the allegations or averments in Paragraphs VI and VII. That has to do with the conditions as to conscious pain and suffering.

Now, with reference to that cause of action, the defendant moves the court for a directed verdict upon each of the following grounds:

1. There is no evidence showing or from which the jury [578] could infer that there was any actionable negligence on the part of the defendant in respect to any failure or neglect to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place to work;

2. There is no evidence, direct or indirect, showing that Nathanael Patrick Hutchison suffered any injury in the course of his employment;

3. There is no evidence, direct or indirect, showing that at the very time when Nathanael Patrick Hutchison fell into the shaft and sustained his injuries, or even at the time he fell into the shaft he was actually an employee of the defendant;

4. That he was acting in the course of his employment at such precise time;

5. There is no evidence, direct or indirect, showing that any condition in the masthouse was the proximate cause of the injuries which he suffered at the time he fell into the ventilator shaft;

6. There is no evidence proving or tending to prove that on the date of the accident, whatever it was, or when the accident occurred, whenever it may have been, there was any necessity for any artificial illumination of any kind or character inside the masthouse, in order to enable any ordinarily prudent or ordinarily intelligent individual to [579] clearly see and observe each and every condition of the masthouse, including, but not limited thereto, the ventilator shaft, the pipe railing safety appliance around it, the escape shaft and the ladder going down the escape shaft.

And, parenthetically, I move to strike out the testimony with reference, or, the evidence with reference to the lack of a permanent electrical installation in that masthouse upon the ground no foundation has been laid showing there was any need for any artificial illumination of any kind.

The Court: The main motion and the parenthetical motion are and each one is denied.

Mr. Gallagher: Now, I move the court for a directed verdict with reference to the last claim, which is denominated in the amended complaint as the second cause of action, upon the following grounds, and each thereof:

1. There is no evidence proving or tending to

prove that the defendant was guilty of actionable negligence;

2. There is no evidence, direct or indirect, proving or from which a jury might find that the defendant breached any legal duty which it owed to Nathanael Patrick Hutchison. And by reference thereto I incorporate each and every separate ground of my motions for nonsuit and for directed verdicts made now, if that is satisfactory to your Honor.

The Court: Yes, it is satisfactory. [580]

Mr. Gallagher: May I make one statement to the court with reference to this—their claim of a cause of action set forth in Paragraph IX, about getting him to a hospital and so forth?

The Court: Yes.

Mr. Gallagher: I would like to have this considered as included in my motion. Your Honor has denied it, but I will ask you to set aside the ruling for the purpose of allowing me to assert one further ground.

The Court: Yes.

Mr. Gallagher: There is no evidence, direct or indirect, showing any of the following conditions:

1. That in the city of Baltimore, Maryland, on April 24, 1951, or on the particular date, whatever it was, that Nathanael Patrick Hutchison fell into the ventilator shaft, there was a hospital with available operating room facilities, which could have been used for the purpose of performing an operation upon Nathanael Patrick Hutchison;

2. There is no evidence, direct or indirect, show-

ing that there was available, in the exercise of ordinary care, any surgeon competent to perform an operation upon this man's head by cutting open his skull and evacuating whatever blood may have been inside the dura at said time;

3. There is no evidence, direct or indirect, showing that an ambulance could have been obtained and could have [581] gotten to the ship where it was located, from wherever an ambulance might have been located, remove the body, conscious or unconscious, from the ventilator shaft, gotten it into the ambulance and gotten it to a hospital in time to have permitted a competent surgeon to have performed any type of surgical operation at the time he got there.

And one other ground, in so far as this particular cause of action is concerned, there is no evidence, direct or indirect, showing what the distances were which existed between where the ship was and where an adequate hospital was located.

What the distance was between where any competent doctor may have been and the hospital; whether any competent doctor was free to perform any such operation; whether laboratory technicians would have been available. All of those things which would have to take place before any operation could be performed.

That cause of action and those claims based upon that theory are, I respectfully submit, in addition to the grounds stated, predicated solely and exclusively upon speculation, surmise and conjecture, and I have in mind what the Honorable Frank Murphy

said in the *Lavender* case about speculation and conjecture.

The complexion of the court has changed since then, and in the case of *Moore v. Chesapeake & Ohio Railroad Company*, [582] the Supreme Court said, "Speculation cannot do duty or take the place of probative facts."

The Court: Mr. Simpson, are you arguing as a separate cause of action here, or basis for recovery, the failure to institute a search for Mr. Hutchison?

Mr. Simpson: Yes, your Honor, we are, in that we have alleged that the officers by failing to conduct such a search were negligent in the performance of the duty imposed upon them by law.

In other words, there are two basic aspects of our particular proposal. First of all, under the Jones Act the employer is definitely required to provide a reasonably safe place for the employee to work, and we, as your Honor knows, have pursued that.

And, secondly, that the officers, agents and employees of the defendant are expected to exercise due care for the safety of the members of the crew coming under their charge.

And we have endeavored to demonstrate by failing to conduct a search they have failed in that respect. And I have in particular, your Honor, relied upon the case of *Harris v. The Pennsylvania Railroad Company*, 50 F. (2d) 866, at 868, where the court, dealing with a problem where a seaman fell off of a tug, through his own negligence, dealt with the specific question, was the employer under

a duty to actually throw a line to the man who solely, by reason of his own [583] negligence, had ended up in this predicament.

The court, in rather extensive language, went on to point out that the relationship in this particular case, under the Jones Act, included not only the negligence involved—or, the failure to provide a seaworthy ship, but extended further, if there was negligence on the part of the employees in looking after the care, by omission as well as commission——

The Court: Your amended complaint puts the two into one cause of action, and I am wondering now if you are contending you have separate causes of action.

Mr. Gallagher: They contend they have three.

Mr. Simpson: No, your Honor. Our position basically is that there are two elements of the negligence embodied here.

The first element is failure to provide a safe place in which to work.

The second element of negligence is in the omission to conduct the search regarding this missing employee.

Now, that is based upon the first cause of action pertaining to the matter Mr. Gallagher referred to of conscious pain and suffering. It also is embodied in the liability with respect to the second cause of action, which is the pecuniary loss of the widow.

Mr. Gallagher: Then their claim is essentially this: If he had been gotten to a hospital he wouldn't

have died. [584] Therefore, the injuries that he suffered at the time he fell into the ventilator shaft would not be a proximate cause of his death.

But the claimed negligence, which was the proximate cause of his death, was the failure to get him to the hospital.

Now, in that connection, I would like to respectfully call your Honor's attention to this proposition: The duty to furnish care to an injured seaman arises only when the injured seaman suffers injury in the service of the ship. And there is no duty imposed upon the master of the ship, who is the sole person on board the ship, who represents the employer for this purpose, to do anything about getting a man to medical care until the master knows, has actual knowledge of the fact that such person has suffered a serious injury or at the very most until the master knows of facts from which an ordinarily prudent person would know, in the exercise of ordinary intelligence, that medical care was necessary.

Now, there is not a word of evidence in this record showing that the master of this vessel knew that this man didn't show up at 1:00 p.m. on April 24th, or that he didn't show up at 8:00 o'clock the next morning, or that he didn't show up at 8:00 o'clock the morning after that.

Therefore, there is no possible foundation here for any claim for damages on the death cause of action, predicated [585] upon the theory that the master of the vessel negligently failed to procure proper medical care for this man, there being no

evidence showing that the master knew or should have known of the necessity.

Now, there is one other point in this case——

The Court: On this motion——

Mr. Gallagher: Well, I don't want to mislead counsel. When I prepared my proposed instructions I relied upon the disavowal which the plaintiff had made during the last trial, which was after the first amended complaint was filed, during the pre-trial, referred to during the trial, and it is in the record, that they did not assert any claim for damages by reason of the alleged failure to get him to a hospital or to get him medical care, on the assumption that that would be the case here, which has turned out to be an erroneous assumption.

After I stated in chambers, in your Honor's presence, and on the record I would not stipulate, in so far as this trial is concerned, that Nathanael Patrick Hutchison did not come to his death as a result of foul play or suicide, I said to Mr. Simpson out here in court orally—not in the record, but whether it is in the record or not I always repeat as near as I can remember what I said—I told him, "Well, I will go along with you on that."

I decline at this time to go along with him on that. I [586] decline to enter into any such stipulation, unless the court instructs the jury that the mere fact that Hutchison did not die as a result of foul play or suicide cannot be used by the jury as a basis of either an inference or a presumption, or anything else, in support of a finding that the de-

fendant was guilty of negligence, either in failing to supply sufficient safety appliances, in and about the ventilator shaft, or in any other respect.

So I withdraw the instruction proposed by the defendant wherein it is stated at the top that the defendant admits that the deceased did not die as a result of foul play or suicide.

And I decline to so stipulate, unless the court gives that type of instruction.

The reason I say this, your Honor, is: that when your Honor went through the instructions proposed by the defendant, you said you would refuse to give that. It was rejected.

Of course, I can't tell whether your Honor is going to give one in substance or not at this time along those lines, and I don't suppose I am entitled to know. But I am entitled to say I will not so stipulate, and I refuse to so stipulate.

The Court: Motion denied.

Mr. Gallagher: What motion is that, your Honor?

The Court: Motion for a directed verdict for the defendant, which we have just made and about midway through your [587] argument you said, "You have already denied it"—which I didn't recall that I had, and I don't think I had—"but I would like to state further argument," and you went ahead and stated one.

I have now, for what I thought was the first time, denied the motion for a directed verdict.

Mr. Gallagher: I request that the court submit to the jury separate verdicts with reference to each

claim asserted by the plaintiff, to wit the one asserted in Paragraph VIII, the one asserted in Paragraph IX and the one asserted in the so-called second cause of action, because they are three separate and distinct claims;

A claim for damages by reason of the fact there was a failure to treat injuries is the same as a claim for damages for aggravation of existing injuries, and that is entirely separate and distinct from a cause of action for the original injuries, as is held in the *Hunt v. The Union Oil Company* case, 111 F. (2d).

The Court: The court will submit to the jury general verdict forms in this case. One for the first cause of action, a separate one for the second cause of action.

Mr. Gallagher: Will your Honor submit to the jury the same interrogatories you submitted to them the last time, upon the defendant's request?

The Court: No. [588]

Mr. Gallagher: I do so request. And I withdraw my request that the court submit to the jury the special interrogatories which the defendant prepared and submitted to the court prior to the time that the case went to the jury last time, and which are in the file in the case.

I made a request that your Honor submit those earlier in the case. I now withdraw that request. That is, my own, the ones I prepared.

The Court: Yes.

Mr. Gallagher: The ones I am asking you to give to the jury are those that you prepared yourself,

your Honor, and submitted to the jury at the last hearing, and your Honor has said you will decline to do that.

The Court: I am inclined generally towards submitting interrogatories to the jury and I generally do, but it is a matter that lies within discretion and I will exercise the discretion against it in this case.

Mr. Gallagher: May I ask your Honor this: In so far as the claim for damages for death is concerned, suppose the jury found that there was no failure upon the part of the defendant to furnish sufficient safety appliances in and about the ventilator shaft, to provide a reasonably safe place to work and would, if that were the only cause of action submitted to them, decide in favor of the defendant.

On the other hand, suppose the jury decides, while there [589] was no negligence in causing his injuries, there was a negligent failure to get him to a hospital and to treat him and he died as a proximate result of that, and they place a general verdict upon that ground. If that is so, or if that can happen, then the defendant in this case is deprived of a substantial right because no court, your Honor couldn't tell on a motion for a new trial whether the evidence was or was not sufficient legally to support the particular grounds upon which the jury might base its verdict in the case involving the claims for damages for death.

And it is for that reason that I respectfully request your Honor to submit to the jury adequate interrogatories for the purpose of making certain

whether they base any verdict, if they render one for the plaintiff on the death claim, upon the happening of the original accident and the injuries sustained there, or upon a negligent failure to get him to a hospital, or upon both.

So that the defendant may have what it is entitled to under procedural due process of law, the foundation to show the United States Court of Appeals just what the jury verdict was based upon, so that that court may be enabled to tell whether the verdict of the jury is or is not supported by legal evidence.

Is your Honor willing to do that?

The Court: No. I did it last time and you challenged [590] everything I did. I was rather unfamiliar with intransigence, as a word, until it was applied here by your opposition, but I think it aptly demonstrates the attitude of counsel for the defendant in his approach to the court's handling of the case, and I am just not going to become a draftsman for you. You haven't submitted any proposed interrogatories to be put to the jury, and I am not going to write them at this stage, when you were drawing those you incorporated into this record by a reference and orally asked me several days ago to give and have now withdrawn.

I am not at the eleventh hour going to start out and draw a new set.

Mr. Gallagher: I will do so.

The Court: I would have to draw a new set for this case.

Mr. Gallagher: I am perfectly willing to pre-

pare proposed interrogatories and will submit them to your Honor in the morning before argument starts.

The Court: I will not consider they have been presented at a timely place in the proceedings.

Mr. Gallagher: Then your Honor would refuse the request?

The Court: I can't tell what I will do until I am confronted with the question.

Mr. Kilpatrick: Would it please the court, if Mr. Gallagher is quite through, we would like to make one motion [591] at this time.

The Court: I thought he had another motion.

Mr. Kilpatrick: Are you through, Mr. Gallagher?

Mr. Gallagher: Yes.

Mr. Kilpatrick: We would like to move at this time that the court now find, as a matter of law, and so instruct the jury, at the time when this accident—withdraw that—at the time when Nathanael Patrick Hutchison suffered the injuries from which he subsequently died, that he was within the employment of the defendant Pacific-Atlantic Steamship Co.; that he was acting within the scope of his employment.

We would like to submit to the court cases in support of the proposition that he was so within the scope of his employment.

Reviewing the evidence briefly, it shows he was there that morning, working that morning. The last time he was seen was either as he was going up the ladder at 11:00 o'clock in the morning or as he was

returning from lunch. That is the only evidence in the record on this point, and there is no evidence, no positive evidence of any kind to indicate that the ship, or anything, that was without the scope of his employment.

I cite to the court *United Dredging Co. v. Lindberg*, 18 F.(2d) 453, in which certiorari was denied at 274 U. S. 759, where a sick man went topside, sat down to rest and [592] stood up and fell later, and was drowned, was held to be acting in the scope of his employment.

The Court: Was that a case supporting a trial court for the granting of the motion of the kind you have made, or was it a case in which it was held that a finding of fact of the kind that resulted in that case was proper?

Mr. Kilpatrick: That question I can't answer, your Honor. Perhaps Mr. Simpson can.

The Court: I read a lot of cases in preparation for this moment of the trial, and I think it is a jury question. That it would be error for me to go over and sit in the jury box and decide it.

We will have to have the jury decide it. Whatever way they decide it, I think there is evidence here to sustain a finding either way.

Mr. Simpson: Your Honor, may I, certainly concurring with the reasoning that motivates the court, but respectfully suggest that the trial memorandum which is in the file, that we offered in the first trial, on page 4 and part of page 5, does set out some precise law regarding the question in support of the proposition that Hutchison was acting within

the scope and course of his employment at the time, and if your Honor does have time, since it is very brief, to look at that, or if your Honor would like me to, I could read it right now. [593]

The Court: All right. Read it.

Mr. Simpson: "The nature of the seaman's employment is such that his vessel becomes both his factory and home, a vestigial reminder of the ancient days when apprentices and journeymen were housed in the homes of their employers. While the watch requirements and collective bargaining agreements may call for an 8-hour day, nevertheless when off watch, he is always subject to the call of duty should an emergency arise. Hence a seaman employee is deemed to be acting in the course of his employment whenever he is aboard ship although even for purposes of his own he has temporarily ceased work. The employment of a seaman includes not only the performance of such ordinary tasks for his own comfort and convenience as are incident to and necessarily connected with his employment. Thus the courts have held that seamen were acting in the course of their employment in the following situations, to wit: Returning to his quarters after securing a drink of water; returning to his quarters after filling a bucket of water with which to wash; occupying the sleeping quarters provided for him; remaining on deck while off duty; the drowning of a deck hand on a tug while borrowing bread from [594] another vessel for a customary late hour snack."

And then it cites Section 46(a) of the U. S. Code

Annotated, the Law of Seamen by Norris, Section 682, and Section 361, detailing many cases in support of the particular situations I have referred to.

Feeling that the evidence certainly does not show that Hutchison left the ship——

The Court: There is the key to the problem. You say the evidence does not show. But isn't it a question for the jury, to determine what the evidence shows?

If you have a jury trial, it is for the jury to make that determination. For me to make it would be for me to invade their province. It is something for me to instruct upon and for the jury to decide.

Mr. Simpson: We have nothing further.

The Court: Any further motions?

Mr. Gallagher: No, your Honor.

The Court: We will adjourn until tomorrow at 9:30.

(Whereupon, at 3:30 o'clock p.m., Wednesday, October 12, 1955, an adjournment was taken to Thursday, October 13, 1955, at 9:30 o'clock a.m.) [595]

* * * * *

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Good morning.

Mr. Gallagher: May I ask a question?

The Court: Surely.

Mr. Gallagher: Yesterday, out of the presence of the jury, you made some remarks. I don't know exactly what you meant by them.

In view of what the United States Court of Appeals said about the last trial, does your Honor have any criticism of my conduct in the presence of the jury on this trial?

The Court: Actually I don't know. I haven't felt moved to make any. I think you have gotten overly zealous in your case. I wouldn't say that there is any reason to say that you had misconducted yourself.

Mr. Gallagher: Thank you.

The Court: Mr. Simpson, as I understood your remarks yesterday, you are contending that the failure to make a search for Mr. Hutchison after the accident constitutes a separate and distinct cause of action. Did I get you correctly on that?

My thought, throughout the earlier phases of the trial, in fact, through the earlier trial, was that it was thought [597] by you and was urged by you to be an aggravating feature on your first cause of action.

Mr. Simpson: The answer, your Honor, is that our intention is that while it might be, if asserted by itself, a separate cause of action, that the way we are viewing it is that it is incidental to the proof in the first and second causes of action, rather than being an independent cause of action itself.

The Court: Are you contending that it was a contributory cause of death of Mr. Hutchison?

Mr. Simpson: Yes, we are, your Honor, and the pain and suffering.

The Court: Are you contending that if Mr. Hutchison had been seasonably found he would not have died, as a result of the injuries which he suffered?

Mr. Simpson: We are contending there is a possibility he might not have, yes, your Honor.

The Court: And what cause of death are you asserting for the basis of the wrongful death claim?

In short, what are you contending was the cause of death?

Mr. Simpson: Fractured skull and subdural hemorrhage.

The Court: All right. Thank you. Now, I have a lot of business in this court. We have another matter which is pressing me considerably, was yesterday, and there were tag [598] ends of that to take care of this morning. The reporter mentioned to me—I mean the reporter, not the litigant—that Mr. Gallagher desired daily copy on the instructions of the court to the jury, and that she was experiencing difficulty in arranging for daily copy on the short notice which has been given.

Daily copy, as you know, under the practice here is usually arranged sometime in advance of the trial. Otherwise, to arrange it depends upon how many reporters are immediately available. We have, I think, two trials that are being conducted in other departments of the court which have daily copy, and all of our reporters are presently engaged, so to provide daily copy for the instructions is going to be very difficult.

Now, I know you have said in other cases that you do not consider my statement that I will give an instruction in substance as adequate. All judges have their own ways of working, which are tied somewhat to their temperament of their training.

Very early in my judicial work, in fact, beginning much earlier, I was encouraged to undertake to get into judicial work by a former judge of this court, now deceased. I tried some cases before him and he had told me, "If you ever get to be a judge, don't ever get into that California system of reading the instructions verbatim. You have got to look [599] at the jury and see they are getting it and tailor your language to the rapport or lack of it which exists at the time, and then give counsel opportunity to point out where you might have slipped on stating some rule."

I always in these cases read the definition of negligence, contributory negligence, requirement of proximate cause as they appear in these California jury instructions, taking the book and reading them directly from the book.

And I also read the requirement as to preponderance of evidence directly from the book. And then, otherwise, I have tried to absorb from the offered instructions those applicable parts and to give them substantially, so far as the law is concerned, from memory, selecting the appropriate language at the time.

After four years of doing that, to the general satisfaction of counsel in other cases, and to your general success, Mr. Gallagher, that is what we **did** in the Anderson case, although you didn't wish it done. I am referring to the second Anderson case. In the first Anderson case I was still so new I was afraid to do it. You won the second Anderson case.

That is what I am going to try and do. It is just

not conducive to the proper tranquillity that the jury should have, for us to spend an hour and a half or two hours in the stating of exceptions.

I know you are concerned, Mr. Gallagher, with the rule of [600] the Appellate Court, that an exception must be stated. I want to cooperate with you. I have felt that the instructions, as submitted, had just become so extensive that the practical purpose, so far as the jury practically getting anything from the instructions, is concerned, would defeat it by reading that great mass of instructions. And some of them, at least, to my mind, have the taint of advocacy, which shouldn't be in an instruction.

A judge is or should be objective about the case, and counsel are and should be partisan about the case, and I think your partisanship and the stress of the trial here is just perhaps brought enthusiasm which led to these instructions lacking the objectivity of B.A.J.I. unadapted. So I will deem that the exceptions, that you except to my refusal to give each and every one of your instructions. But I would like you at the close of the instructions to come up here and state, without specifying in intricate detail, but to specify enough that I can see or have my mind called to a serious omission or a serious misstatement.

For instance, in a case I recently tried—it was a long case and had many issues—in giving instructions in that way, although I had in my notes to give it, I overlooked a particular subject respecting a highly pertinent point of evidence, and when counsel pointed it out I immediately gave it. [601]

I will do that in this case. But I hope we can keep the exceptions down to where the jury doesn't become irritated at any of the personnel here, either you or Mr. Simpson, or the judge, because of the extended duration of the statement of exceptions.

Mr. Gallagher: May I make a suggestion to your Honor?

The Court: Yes.

Mr. Gallagher: In an effort to be helpful to the court, I will state now that I see no reason whatever why the court should not be able to state to the jury all of the law applicable to this case orally, without reading any instruction proposed by either of the parties. And the court will do that if the court will keep in mind the essential bases of action negligence.

No. 1. What duty is imposed by law upon the defendant Pacific-Atlantic Steamship Co. with reference to the allegations in the first amended complaint.

In other words, directed to those averments of the first amended complaint.

No. 2. After stating the legal duty, for example, your Honor should tell the jury what legal duty was imposed upon the defendant and upon what agent of the defendant to provide proper medical care for Mr. Hutchison.

I think the only agent of the defendant who could be charged with the performance of that duty, if it arose at all, [602] was the master of the vessel.

Next, your Honor should tell the jury what the

issues of fact are, as raised by the pleadings. Those issues are simple. There is a specific allegation with reference to alleged negligence, in a failure or negligence to supply sufficient safety appliances in and about the ventilator shaft and in masthouse No. 2, to provide a reasonably safe place to work.

Next, as the plaintiff claims, in making these suggestions I am not agreeing these issues should be submitted to the jury.

Next, she claims that as a proximate result of the same alleged negligence, in the omission to do a certain thing with reference to safety appliances, Nathanael Patrick Hutchison, during his lifetime, suffered conscious pain and suffering.

Now, as a corollary, counsel says he also claims that a failure to conduct a search was negligence. I don't know what your Honor is going to do with that, but I think you have got to tell the jury that there was or was not a legal duty to search for him simply and solely because of the fact that he didn't show up for work. I don't think there was any such legal duty.

Then your Honor will have to instruct the jury about what constitutes negligence on the part of the deceased. [603]

In other words, tell the jury with reference to him, and referring to him, that negligence is the doing of something which an ordinarily prudent seaman would not have done, or the failure to do something which an ordinarily prudent seaman would have done, under the same or similar circumstances.

the scope and course of his employment at the time,

And that if he was so guilty of negligence, and it was the sole proximate cause of his injury, then, with reference to the claims for conscious pain and suffering, and with reference to the damages for death there is no cause of action and the verdict would have to be for the defendant.

However, if the jury finds, in response to your other instructions, the defendant did negligently breach some duty it owed to Mr. Hutchison or to Mrs. Hutchison, and that as a proximate result thereof this death occurred, and so forth, and he was guilty of contributory negligence, then the jury would have to diminish the damages in accordance with the percentage with respect to which his negligence proximately contributed to his injuries.

I don't think your Honor should have any trouble with injuries, with reference to the measure of damage, if they are couched in language which does not convey to the jury the idea that your Honor is assuming that the lady is entitled to recover any damage.

Now, there are other subjects that your Honor, I suggest, [604] should cover clearly. No. 1. The statutes of the United States impose certain specific duties upon the Coast Guard with reference to the inspection of vessels. I have called the statutes to your Honor's attention.

I think you should instruct the jury that the law required the Coast Guard to do thus and so, insofar as the statute is applicable to safety of life and so forth.

And that your Honor should tell the jury that in

the absence of evidence, direct or indirect, to the contrary, the jury must find in accordance with the presumption that the Coast Guard performed its full, official duty in that respect before issuing a certificate of inspection.

I think that your Honor should also cover this question of illumination in the masthouse, to tell the jury that unless the plaintiff has proved that the inside of the masthouse on the date and at the time when Mr. Hutchison got into this ventilator shaft was so lacking in visibility as to make it necessary to have artificial illumination, and that unless the plaintiff has proved that they will disregard all of this testimony about no permanently affixed electrical fixtures.

Now, there is one other thing that I think I should call to your Honor's attention. I don't believe that your Honor should give the jury a general definition of negligence, because that would permit the jury to wander throughout the length and breadth of negligence generally, and they would not [605] be confined to the averments of the complaint setting forth Mrs. Hutchison's specific claims of negligence, as denied by the answer.

And there is a case—there are a lot of cases, but there is one in 216 Fed (2d) which holds that it is the duty of a United States District judge to confine instructions, with reference to negligence, to the specific allegations which are set forth in the complaint, and not give some general definition of negligence which would permit the jury to say, "Oh, well, I think the president of the corporation

should have been in Baltimore and I think the defendant corporation should have had somebody leading this man around by the hand all day," and they didn't have one leading him around by the hand and therefore, they are guilty of negligence and so forth.

That is why I think that these instructions should be restricted to the issues raised by the allegations of the complaint and denied by the defendant.

The Court: They will be.

Mr. Gallagher: Now, one other thing. The only possible causes of action which this plaintiff might have are strictly and exclusive statutory. And those causes of action are separate and distinct and, therefore, there must be a separate verdict as to each cause of action.

The Court: There will be. [606]

In fact, I have decided that, generally speaking, the interrogatories I worked out at the earlier trial were a good idea. Many of the suggestions of the interrogatories you proposed here are good, but they have become lengthy before you finished with them, so I will stay down this evening and work out a set of interrogatories which will require this jury to state whether they find negligence, whether they find contributory negligence, or whether they find proximate cause, whether they find conscious pain and suffering, and if they do so find it, what they allow for it.

Mr. Gallagher: I have asked for one, your Honor, which this jury can't answer, but it is a

material issue in the case. What date and what time on what date did Nathanael Patrick Hutchison hit the bottom of that ventilator shaft and suffered his injuries.

If the jury can't answer that question, they can't say there was any negligence in failing to find him or failing to send him to a doctor, and they can't say that he suffered them in the course of his employment, in the absence of their ability to make that kind of a finding.

See, your Honor, there is no evidence in this case showing how this man was dressed when he was found. Was he in dress clothes, was he in working clothes?

The evidence shows he had \$125.00 or \$130.00 on him at 10:00 o'clock in the morning on April 24, 1951. How much, [607] if any, did he have on him when his body was found?

If he didn't have \$125.00 or \$130.00, then he would have had to leave the ship in order to spend some of it. Or he was——

The Court: There isn't any evidence as to what spending possibilities or gambling possibilities were present at the ship. While you object to speculation, or what you consider speculation on behalf of Mr. Simpson, you ask it be indulged in in behalf of your case.

Now, we have come to the point, I think, I have what you want.

Mr. Gallagher: May I state one thing more?

The Court: Yes.

Mr. Gallagher: Your Honor, there is available

evidence with respect to the amount of money which was on Mr. Hutchison's body at the time he was found, and it was not \$125.00 and it was not \$130.00. It was less than \$120.00.

The Court: It is a subject for argument.

Mr. Gallagher: It isn't in the record, though.

The Court: I am not going to curtail either of you on your argument. You argue until you feel you have got your points before the jury.

As I have told you, I have some other cases which are in critical phase and I will have to take recesses for them. I will try not to take it at times that will break the [608] sequence of a particular thought, but don't feel that I am trying to hamper you on the argument.

Mr. Gallagher: Your Honor, I want to be as nearly as I can be entirely fair to the plaintiff and entirely candid with the court. And I offer to Mr. Simpson, in case he wants it and will permit it to be introduced in evidence without any objection, photostatic copies of pages 15, 16 and 17 of the deck log or bridge log of the vessel. That record shows that when his body was found he had on him \$118.20.

Now, if counsel wants to offer this photostatic copy of the record—this entry was made on May 1, 1951,—I will offer it to him and he may offer it in evidence.

Mr. Simpson: The plaintiff has no such desire, your Honor.

The Court: Mr. Bailiff,—

Mr. Gallagher: I didn't think you would.

The Court: —bring in the jury.

Mr. Gallagher: Do you still want us to try and work out daily copy, if it can be done, because, as I understand it, your Honor is going to give most of the instructions orally. When instructions are given orally it takes a longer time to take exceptions than it would if you had it in writing, because you have to have the reporter read any that are questionable in order to take proper exceptions. Could we have two reporters? [609]

The Court: The reporter says it is practically impossible. We will see what we can do. We will try to arrange it.

The court will pursue a liberal policy with respect to the statement of exceptions, so that they needn't be stated with exact and legal perfection, in order to be considered.

We can't be perfect. There is nothing perfect in this imperfect world, so I am told, at least, by people that should know. I know that optimum tends to the same thing, so we won't expect you to tend to be perfect in stating the exceptions. [610]

* * * * *

Mr. Simpson may now make the opening argument for the plaintiff.

Mr. Simpson: The court please, Mr. Gallagher, ladies and gentlemen of the jury, we spent quite some time gathering evidence here. You remember at the outset of this particular case we asserted to you the evidence would prove certain particular allegations of the complaint of the plaintiff.

Now, before explaining my version of the case at

this particular time, in light of the evidence adduced, I would like to thank you, each and every one of you, for the attention you have shown throughout this trial. I would like to say that at the outset you will recall that we advanced really a rather easily understood position. We pointed out this was an action under the Jones Act by a seaman who had [612] been injured in the course and scope of his employment.

We further contended that under that particular law the employer, the Pacific-Atlantic Steamship Co., was required to provide a reasonably safe place for this particular individual Nathanael Patrick Hutchison to work. Then we added reasons why we believed that they had failed in that particular.

And we said the evidence would support that and it would show that the man Nathanael Patrick Hutchison had suffered conscious pain and suffering, and that his widow had suffered a pecuniary loss. Since that time you have heard a great deal of testimony, both pro and con, regarding the character of the masthouse and what was in there and how much you could see and how much you could see with the door closed and how much with it open.

I submit at this time that basically that might tend to be confusing, because in a primary sense it doesn't make one bit of difference whether the door is opened or closed, in that particular action, under the Jones Act, which is brought because there was a failure to provide a safe place for this man to work.

Now, our contention is not that the Act says if

the door is closed it is dangerous, or that if the door is open it is not dangerous, but, on the contrary, the question that you are basically concerned with is, did the Pacific-Atlantic [613] Steamship Co., in fact, provide a reasonably safe place for Nathanael Patrick Hutchison to work.

Now, it was our contention that they did not. You remember the very first thing we emphasized with respect to this was that they did not, in that they failed to provide adequate illumination in and about the area where he was working.

Now, in support of that we first brought Captain Crawford before you and Captain Crawford testified there is a custom to provide adequate illumination in and about the area where the crew will work. Now, there was no testimony to the effect that it is not customary to have adequate illumination in and about the area where they work.

So the next thing we have to consider is the very nature of this. The evidence then showed that the masthouse in question did not have any permanent fixture whatsoever for providing artificial illumination.

Secondly, there is no evidence in the record at all to date showing that in that particular masthouse there was any portable type of artificial illumination being used.

Now, let's look at the evidence for the moment, if we may, regarding the door closed, the door open. Just what did we have come before us?

First of all, you remember we had Captain Castle's deposition, in which we had testimony from

him, and you recall, [614] in answer to the question when he went into this particular masthouse, the question put to him was, "Did you examine the masthouse with the hatch door closed?"

"A. The mate and I closed the hatch door to see just how dark it was in there and it was quite dark."

And this was in late forenoon. That would certainly suggest that we have a condition where you have a very dark masthouse with the door closed.

But going further, you remember questions were asked of John Hutchison and the reason I feel it imperative to bring some of this to you is that sometimes in reading this it might escape you, as to just exactly what has been read, since so much testimony here has come in by way of deposition.

Now, John Hutchison was asked questions by the court regarding this condition of when the door was closed. The court asked: "Did you close the door after you went in?" And he answered, "Yes, we did."

"The Court: Did you see around?"

"The Witness: No light, no, sir."

"The Court: What was the condition of visibility? 'No light, no, sir,' might be taken to mean there was not any light fixture or open window or anything of that kind, but could you see your hand before your face at two feet? [615]"

"The Witness: Not when the door is closed, no."

"The Court: Was there any window in the masthouse?"

"The Witness: No windows."

“The Court: Was there any transom or skylight in the masthouse?

“The Witness: No transom or skylight.

“The Court: Could you see a light coming in through the crack of the door?

“The Witness: No light coming from the door.

“The Court: You mean to tell us it was absolute darkness when the door was closed?

“The Witness: That is right.”

So with the door closed these two witnesses would certainly be supporting the proposition in this area where there was no provision made or no artificial light provided with a permanent installation, that it was dark.

But, of course, the defendant brought in certain witnesses, too. They brought in Mr. Dyer, the Marine superintendent of that company, who said that with the door closed he could look around and could see.

And brought in Mr. Webb, a marine surveyor, who said he could look around and see. But we will have more to say about that in just a moment.

The important thing I wish to emphasize is there seems to [616] be accord, at least, in the fact in this particular masthouse, with the door closed, it was dark.

Now, secondly, let's look at the question of what was the illumination with the mast door actually open. Now, the people who answered that question, you will recall that we asked the question of Mr. Castle and he gave this particular answer, with the door open:

He said, "My opinion is that with proper illumination or with the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse."

Now, that was the plaintiff's witness. And I point out to you there is apparent confusion here, because he says "with the doors wide open".

Now, if you will look—and you can do this when you get into the jury room—looking at these particular exhibits, looking at Plaintiff's 7 and 8, you can see the number of doors on the masthouse. But the significant thing is that actually the masthouse in question, the No. 2 masthouse displayed in Plaintiff's No. 3, has one door. It does not have doors, so a person looking at this might feel that light was going in with both doors open.

Let's go further and see exactly what the condition and the testimony in that regard is. Remember the court also asked Mr. Hutchison just what he had been able to see with [617] this door open, and Mr. Hutchison—the court asking the questions said:—

"Couldn't you see around pretty well when that door was open when you were in the masthouse? Couldn't you see around the masthouse all right?"

The witness answered:

"As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see.

"The Court: You mean by that it was like any enclosed room when you open a door and you are

coming in from a bright light, you have to get accustomed to the darker light?

"The Witness: That is right."

Then, of course, the defendant brought in witnesses to testify regarding this condition, too. Again, Mr. Dyer and Mr. Webb, regarding the visibility when this was opened. One thing of very particular note I feel should be made at this time is that I asked the question of Mr. Webb—he spoke about all the things he could see when that door was open, but the particular question I put to him was when he made these drawings, when he went to work in the area, then did they use any lights, and his answer was, "We asked to have lights put in during the time of our survey."

In other words, while working in this particular area, [618] even the defendant's witness goes so far as to say lights were necessary.

Now, from this it seems to me that it is imperative for us to draw the conclusion that with the door closed, without any permanent installation for artificial illumination, that we have to draw the conclusion that it was dark in this masthouse.

And secondly, that if the door is open we are required to say that certainly it was dim, but, fortunately, we can take our advice perhaps from the old Chinese idea that a picture is worth 10,000 words, because when we run into witnesses and recognize that the witnesses are giving their viewpoint, their impression, and if there does appear some degree of conflict here you have the advantage, we are happy to say, of looking at the exhibits, and at

this time I am going to ask you to look in particular at this area, for example, looking at Plaintiff's No. 3, which is the masthouse in question, because I think we can agree that with the door closed it was dark in there—this is with the door open—and ask yourself the question, since you know there is a floodlight in there, the testimony having been to that effect, when this picture was taken, what would the inside of this particular one look like if you took that light out.

You don't have to speculate on that at all, because you can actually look at Plaintiff's No. 8, which is a picture [619] taken without lights in there, and you can see on Plaintiff's No. 8 about the darkness, blackest thing you can see on the entire picture is that masthouse.

Of course, you might say that is taken from some distance. I ask you then simply to think of Plaintiff's No. 3, which is a close-up, if there were no light in there, and I believe that the evidence will definitely require the conclusion that it is dark when the door is closed. It is dim when the door is open.

Ladies and gentlemen, we do not resign ourselves to that one issue. We do not conclude that, in and of itself, is the only thing where there was negligence here. Our contention is that a light should have been provided, adequate illumination. This custom should not have been violated.

But we secondly contend that this was not a safe place because there were very simple things that could have been done, which were not done.

Now, I want to be understood that it is not our position that the Pacific-Atlantic Steamship Co. was under an obligation to hire somebody in the way of a safety engineer or somebody like that, to go board the ship and lead each man around by the hand to make sure that nothing happened to them.

It is not our position that they were required to go out and purchase the latest, the most modern safety devices that were available on the market, they were under an obligation [620] to make this 100 per cent accident or injury proof.

It is our position they were under a duty, though, to do what any reasonable person would do to make this safe.

Now, it is our further position they did not do this. We emphasize that because you remember Captain Crawford came before you and he said, "I have seen screens on these particular ships," and he referred to the screens. He said he had seen **them** going from the very deck right up to the overhead.

In addition to that what did Mr. Amundsen say? Mr. Amundsen, remember, was part of the crew, and he was asked what he had seen, and Mr. Amundsen—the question was:

"Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?"

"A. Well, other ships got screens down here, and stuff like that.

"Q. When you say 'down here', where are you pointing?"

Mr. Gallagher: I don't think that is in the record.

The Court: The jury will remember the record. He may read any portion of it.

Mr. Gallagher: I request the court to check that now. I don't think that that is in the record of Amundsen's testimony, and I request your Honor to instruct Mr. Simpson to withdraw that reading and to instruct the jury to disregard it. [621]

Mr. Simpson: I read this, your Honor, as part of the record.

Mr. Gallagher: I don't think so.

The Court: The jury will remember what the evidence was and either of you may read portions of the Amundsen deposition which were read at the trial.

Mr. Gallagher: Is your Honor permitting Mr. Simpson to read this to the jury and allow the jury to decide whether it is or is not in evidence? I request your Honor——

The Court: If it was read before——

Mr. Gallagher: I don't think it was. I would like to have the record read by the reporter. I would like to have your Honor check that, because I don't think that was read, that part of it.

Mr. Simpson: You Honor, I submit that Mr. Gallagher is in error. On my oath, as an attorney before this court, that I read this particular portion——

The Court: Will you pass it up to me? It is difficult for me, however, to remember at what time various parts of this have been read, because we

had so many readings of it. I will try to see if I can recall that this was read in the presence of the jury as evidence in this case.

Where does your part begin, Mr. Simpson?

Mr. Simpson: It begins, your Honor, on page 17, lines 1 through 12. [622]

The Court: It is your recollection, Mr. Simpson, that was admitted in evidence in this case?

Mr. Simpson: Yes.

Mr. Gallagher: It is my recollection it was not.

The Court: It is your recollection it was not?

Mr. Gallagher: Yes.

The Court: Have either of you had the transcript of the proceedings written up by our reporter?

Mr. Gallagher: No.

The Court: It will take a long time——

Mr. Gallagher: I don't think so. All she would have to do would be to find the part immediately preceding that and see if that is in it immediately following. It won't take a long time. We can find that easy enough.

The Court: You said, Mr. Simpson, you represented to the court on your oath as an attorney this was admitted in evidence at this trial?

Mr. Simpson: Yes, your Honor.

The Court: All right. You may read it. You may read it with recognition before you read it that you should recognize that if it was not and if you should prevail here, I will have to grant a new trial because you can only argue the evidence that was admitted here before this jury.

Mr. Gallagher: May I request the reporter to find that part during the time between now and 1:30 or 2:00, and read it [623] to the court so your Honor can instruct the jury it is or is not in the record, and if it is not, to disregard it.

The Court: I will ask her to find it before I instruct the jury, which will be tomorrow. I will ask counsel to inform her as to what time it was read.

Mr. Gallagher: I will show you my copy. That is the one that it was being read from, and you can see what it is on there, and I didn't put it there now.

The Court: Proceed with the argument.

Mr. Simpson: "Q. Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?

"A. Well, other ships got screens down here, and stuff like that.

"Q. When you say 'down here', where are you pointing?

"A. Well, over a hatch. I mean, it is—you know——

"Q. The witness is pointing——

"A. Over the opening."

I might say, to make this easier, that this particular witness was referring to Plaintiff's No. 2, and we asked the question:

"You say 'the opening', you are referring to which [624] opening, the ladder opening or the ventilator opening?"

And the answer is:

“Here, the ventilator.”

In other words, the testimony of a man who actually had been working with Mr. Hutchison was that on other ships that he had seen a ventilator shaft or a ventilator shaft covered by a screen at that upper portion.

But, irrespective of that, again we are helped by the actual evidence before us, because here we have an open ventilator shaft.

What is the physical evidence that actually aids us in determining this matter? Is it unreasonable, ladies and gentlemen, to expect that a screen might have been put over there? Is it unreasonable, knowing that a screen would make falling by a man into such a ventilator shaft impossible?

I ask you at this time to look at Plaintiff's No. 7, and here is the ventilator shaft we are discussing (indicating). Plaintiff's No. 7 shows a ventilator with a screen. That is one screen.

Plaintiff's No. 6, inside of masthouse No. 2, shows the overhead area; two screens in the same ventilator shaft that we are concerned with.

And then Plaintiff's No. 10, which is the ventilator shaft into which Nathanael Patrick Hutchison fell, a third [625] screen. In other words, three screens located within the same ventilator shaft. Had one been put over this particular area a man would not have fallen in.

The important thing we are trying to emphasize here is we are concerned with having people do what is reasonable. Is it unreasonable when they

already have three in the same ventilator shaft to put one here in the area to make sure a man doesn't fall in, should he make a mistake, misstep, or whatever it might be, whatever the cause may be?

But I submit aboard this particular ship there was even something else. Remember that Captain Crawford and Mr. Dyer—you remember Mr. Dyer was the marine superintendent for the Pacific-Atlantic Steamship Co.—they looked at Plaintiff's No. 4. Now, that is on the starboard side. In other words, here (indicating), looking at Plaintiff's No. 7, this is the masthouse where this happened; the other side, you have got a masthouse here (indicating). And the one that is on this side is the one which we find disclosed by Plaintiff's No. 4.

I asked him about this ventilator shaft that goes down. They said it goes on down to the hold, just like on the port side. And I asked if you could get into that ventilator shaft, and they answered no, because it is blocked off. This is the answer we got from the marine superintendent of the Pacific-Atlantic Steamship Co. and Captain Crawford, that on [626] the other side of this ship they had it set up so that a man could not get in there.

Now, I ask you, why couldn't the same thing be done on the left side and the right side, rather than just the picture of a safety precaution put in here so that a man can't get in, and on the other side leaving just some bars that he can slip through?

In other words, on the very ship in question. And we have the evidence that answers the question, was

this a reasonably safe place? The answer must be no, because it certainly is not expecting too much to expect them to put one more screen in there or to make the port side like they have already made the starboard side.

In other words, ladies and gentlemen, we are not asking for the impossible or an absolute setup here, but we are asking that this which appears to us to be the minimal thing should be done.

Furthermore, we go a step further in this plan. It is not only that they were insufficient in providing safety by providing insufficient illumination and by failing to put a screen or other protective device that would have made such a thing as this impossible, but we suggest further to you that the failure to conduct the search, with knowledge of the fact this man was missing, was further negligence on the part of this particular steamship company.

Now, Captain Crawford said it was customary to conduct a search when a man was missing, and he explained what that included, which impressed me as being nothing in the world but common sense. At 1:00 o'clock this day this man was missing. The man was going to work. Any employer who, naturally, is paying people figures, "Well, I certainly want to make sure that men are working." So if he misses, he is not showing up, what do you do?

Well, the boatswain said, "We didn't conduct a search, but actually it was customary to conduct a search."

And Crawford said, "The thing that we do in conducting a search—" and this is the common

sense “—first of all, we look in the area where the man had been working. We report it to the chief officer and then we check, and if necessary we conduct a complete search of the ship until the man is found.”

I submit that had that been done in this particular case, there is no question about the fact that they would have been able to have found Scotty Hutchison, who was at the bottom of the ventilator shaft.

Of course, you might say, “What is the significance of this? Why search? What difference would it make, anyway,” particularly if we think about the medical testimony that is in here. What difference would it have made? First of all, I am suggesting to you it would have made a difference in [628] that if this man had been found, and even if his life couldn’t have been saved, which we don’t know, but if he could have been found alive, that something could have been done by way of supportive or palliative treatment, which could have relieved any pain he might have been enduring these lucid moments, these conscious moments.

You remember even Dr. Adelstein, the defendant’s doctor, said in 40 per cent of these cases there is lucidity or consciousness.

And so how are we to know such a thing didn’t exist in this particular case? You might say on this medical testimony we seem to have some measure of conflict here, because we have a doctor coming in and saying, with respect to acute dilatation,

"This type of injury could cause it." That was Dr. Cefalu.

Then we have Dr. Lajoie and Dr. Adelstein saying no, and then we have Dr. Dickerson taking the stand and explaining it very definitely could cause it.

I submit, ladies and gentlemen, you don't need medical experts to see the logic involved in this. And I will try to bring out at least what to me appears to be a very logical basis that explains this. You recall the testimony of Dr. Dickerson on one particular point. He was asked the question on direct examination:

"Doctor, can there be subdural hemorrhage if the [629] heart stops beating?"

His answer was:

"No, sir. When the heart stops beating all circulation in the body ceases instantly. If there is an open or torn vessel, the bleeding stops immediately. When the heart stops working the circulation stops, because it is a pump forcing the blood around. When the pump stops everything stops."

What does that mean? If we actually consider that—and I don't pretend to be any artist on this—if we consider this to be the heart (indicating). In other words, that is a pump and it is actually pumping something that we call blood to the rest of the body, feeding the body. So that through the arteries it pumps this blood out.

Now, if we consider that this is a person's head (indicating), what is it that has been contended

for by the defense here, in the theory they have constructed?

They have said because the autopsy of this man showed acute dilatations of the heart, that he was probably at the top of the ventilator shaft, he had an attack and that he then went into the ventilator shaft and that the acute dilatation is really the cause.

Now, actually, as a practical matter, because of the testimony that you have before you, if you had this acute dilatation, what is going to take place? You just cut this [630] off, do you not? The pump stops. If the pump stops you are not going to get this blood flowing around in here (indicating). It is just like turning a faucet off at home.

Let's go a step further, if we may. If a man, on the other hand, has fallen into this area, he hits head first, he cracks his skull and he had injury to the brain and begins to bleed, so that pressure is built up here (indicating)—remember, this subdural hemorrhage is like springing a leak. The pipe has got a hole in it. One of these veins or arteries might have been injured. While this builds up the heart has to work harder to do the job that it undertakes to do. Consequently, as it works harder and harder the heart, because of the strain, the terrific strain imposed on it, as this builds up, the subdural hemorrhage, this leaking of the blood, acute dilatation sets in and the man dies.

But the important thing is that the cause of death is just as the autopsy findings, testified to here before you, showed, that Scotty Hutchison's

cause of death was the fractured skull, the subdural hemorrhage, and that that condition led to the acute dilatation of the heart. It was not a question of getting up and suddenly passing out, because the important thing is that if that happened, if acute dilatation of the heart had set in, as Dr. Dickerson testified, there could be no subdural hemorrhage because if this pump stops—in other words, if he is standing up there he hasn't got a [631] subdural hemorrhage. Then he hasn't got a fractured skull. So if you stop the pump, the circulation stopped, you would never get the subdural hemorrhage.

So, as a logical matter, we have to say the acute dilatation of the heart followed this other. It did not occur before as the defendants have tried to construct a theory here that it did.

Now, our contention is that when this man fell he experienced conscious pain and suffering, and you have testimony on that. Dr. Cefalu told you it was a course for people to go through this lucid interval; they would be perhaps rendered unconscious and then have some period of consciousness again.

Also, Dr. Dickerson told you that. Now, they couldn't tell you how long; they don't know. But the important thing is that when this man fell and went through this, we actually have nobody searching for him, nobody trying to find him.

In connection with whether his life could have been saved, you remember the testimony of Dr. Adelstein when I tried to get him to say, well now, assuming the situation we have an emergency, we

take him to the hospital, we get him there and you get ready to go with this man, and he gave me an answer about how it would take hours and how it might be difficult to get an operating room at the Good Samaritan Hospital.

And then I asked Dr. Dickerson, and he said that with an [632] emergency, it is desirable to conduct as much of an examination as you want, but that actually within a half hour he can be in there working on this person.

So for that reason, I emphasize if a search had been conducted and if he had been taken to the hospital his life might possibly have been saved, and that there certainly was a type of negligence here, failing, with knowledge of the fact this man was missing, to even conduct a search. So our conclusion regarding the liability of the defendant Pacific-Atlantic Steamship Co. must be that where, in the face of a custom to provide adequate illumination, they do not provide it, and where, with the type of screens right on their ship they could have used to cover this open ventilator shaft and they don't use it, they don't take advantage of this very simple thing, which, certainly, common sense would say would be negligible, or don't do what they are doing on the other side of the ship, and then when they know the man is missing, don't even trouble to conduct a search to find him, it is our contention that they were negligent in a manner, in that they failed to provide a safe place for this man to work.

Now, actually, this is what the evidence, we believe, shows regarding conclusions and things we

have asserted here: But how did this happen? Actually, there is no evidence in the record to show that anybody saw this happen. There is no evidence in the record to tell that—well, it was going [633] up or coming down, or that it was going into the mast-house door or coming up from below. But we would like you to know how we believe it did happen, what you can reasonably infer from the evidence. First of all, it is undisputed on this particular morning of April 24th Hutchison did report for work. He was working for the Pacific-Atlantic Steamship Co. He was ordered to go down below by Boatswain Kalnin.

He worked with some men until a little after 10:00 o'clock and came up for some coffee. That is all undisputed.

Thereafter he went down again. That is undisputed. Then we have Amundsen, who was working with him, telling us that, "I saw him go up," and he wasn't sure, he thought that was the last time he had ever seen him. He might have seen him again.

And then we have a conflict on this, because the boatswain says, "I think I saw him at noon." And he is clearly confused, because on cross examination by Mr. Gallagher it was brought out that when—before a Coast Guard inspection unit he told them that he had seen this man in the mess hall. Well, he didn't think he saw him in the mess hall. He thought he saw him in the companionway. I am suggesting to you at this time he didn't see him at all. He might have seen somebody aboard ship that

looked like him or he might have been recalling when he saw him at the time that he came up for coffee. [634]

I will tell you why we take this position: If we followed the conclusion that he was up there at noontime and that this injury occurred thereafter, we would have to draw a conclusion that doesn't go along with common sense, that is, if this man went into that masthouse after noon, why would he do it? The logical reason he would do it is because he is going back to work.

You remember it was brought out this man didn't get in until 4:00 o'clock in the morning. That the boatswain had to shake him to get him up to go to work at 8:00 o'clock. Does it seem reasonable a man who is tired, who has had very little sleep, is going to say, "I have got to get back there to work early"?

No. The more plausible explanation is that the boatswain was confusing this time with the time at coffee, and that what actually happened was that at 11:00 o'clock or thereabouts Scotty Hutchison told Amundsen, who was working with him, "I am going up to the lavatory to get a drink." And that he started up this particular ladder. That was the ladder in the No. 2 masthouse that we have been discussing so much.

There are a couple of things I want to show you in explaining how we think this happened. You can see the top of this ladder in Plaintiff's No. 1. You can see where the hands are cut. You can see

that the top of that ladder is actually a little below the deck. [635]

Now, our contention is that he left the hold down there to go up to the lavatory to get a drink. That he was coming up this particular ladder. That the rungs are not as far apart as this particular pipe rail here (indicating). That he climbed and with the lack of illumination in there with the door closed, as he climbed he reached the end of the ladder and did not know he had reached the end of the ladder, and if you take one more hand or grab at a distance, the same as these ladders, as the evidence that you look at, which is in here, that the service report will show, if you reached an exact distance of the next rung you would be grabbing a handful of air, and if you are climbing this ladder and you reached for a handful of air you go forward. There is no ladder, as the evidence shows, in this ventilator shaft. So that if you go forward there is nothing to grab hold of, and you do not know you are there. Scotty Hutchison climbed up and got either to here and went over, or he might have gone a little higher (indicating). In any event, he lost his perspective at this point, because being unable to see he was at the end of it he grabbed for what appeared to be or would be a ladder rail and it wasn't there.

He was precipitated forward, he lit on his head, he experienced this fracture of the skull and the subdural hemorrhage followed.

Now, that can be inferred from this evidence: The [636] evidence does not conclusively establish

that, that is our feeling as to how this happened. We feel that it is more plausible to believe it happened coming up than going down.

But basically it doesn't make one bit of difference whether it happened coming up or going down, because if the screens had been there, if adequate illumination had been there, if that port side had been the same as the starboard side this would not have happened.

Now, if you do find that there is a violation of a duty here by the defendant, in that they have failed to provide a reasonably safe place, they haven't done what a reasonable person would do to make this place safe for Scotty Hutchison, then what are the damages that confront you, because those damages have to be translated into dollars and cents.

At the outset we told you we were asking, because the law provides for two causes of action here, we were asking for two awards. We were asking for one by reason of the conscious pain and suffering that he suffered, and, secondly, we were asking you to bring back an award for the pecuniary loss suffered by his widow.

Now, how are you going to compute, how can you compute this conscious pain and suffering? How can you translate it into dollars and cents?

We ask you to bring back \$25,000.00 for the conscious pain and suffering. You can bring back nothing if you fail [637] to find any. You can bring back one dollar. You can bring back whatever you want.

Our selection of a figure on this basis has been

quite arbitrary, because we had felt we had to pick something, that the evidence does show that the man did go through a period of conscious pain and suffering, and for that reason there should be some compensation for that.

But the thing with which we are most concerned here is that after this man died, we have a widow,——

The Court: Are you going now to the second cause of action?

Mr. Simpson: Yes, your Honor.

The Court: All right. I think we will take the morning recess.

(Short recess taken.) [638]

Mr. Gallagher: A confession is good for the soul. I want to apologize to everybody, including Mr. Simpson. I was absolutely wrong and he was absolutely right.

The part of the Amundsen deposition he read about the screen was read to the jury, and I am sorry I suffered from amnesia.

The Court: Proceed with the argument, the jury being present.

Mr. Simpson: Thank you, your Honor. Ladies and gentlemen of the jury, just before recess I started to mention the manner in which we determined what you should, providing you find liability, bring back by way of a judgment for Mrs. Hutchison, by reason of the pecuniary loss she has suffered.

Now, you will recall that when she was on the stand we asked her regarding the income during

that particular year, and we introduced into evidence Plaintiff's 17.

On that particular income tax return, it was testified that Nathanael Patrick Hutchison had earned \$4,075.96 during that year. You heard further testimony to the effect that Mrs. Hutchison would receive 75 per cent of what he actually would earn; being at sea, the type of person with his room and board there, that he sent that home.

So we have to explain something further. What can that [639] pecuniary loss be? How long is Mrs. Hutchison going to live and actually the life expectancy of Mrs. Hutchison, being age 53 at the time of this particular accident, is that of 19 years.

Now, the other cause of action we referred to, where we said you would have to figure out just what would be brought in, and you will have to figure out just what will be brought in on this one, that on this one we have some figures which are a little more helpful, because we have a few things from which we can draw conclusions.

Well, maybe I will take this one down, if I may. Actually, with Mrs. Hutchison being 53 years of age and having a life expectancy of 19 years, we have to say, "Well, now, what is it that she has lost?"

If she has lost 75 percent of what he earns, you can check on my figures if you want to, since I don't pretend to be a mathematician, but the actual figure of Mr. Hutchinson's income, as I told you, was \$4,075.96.

Now, in computing 75 per cent of that, the figure

I received was \$3529.47, which would be 75 per cent of this figure that he earned (indicating).

In other words, it would constitute the pecuniary loss she would actually suffer for her life expectancy of 19 years. If we multiply that out, we get—which gives us a total of \$69,059.93. [640]

Now, that is the actual figure that we get by this computation, but there are factors to be taken into consideration respecting the health of Nathanael Patrick Hutchison, the type of employment and other factors that enter in. So we believe that this particular figure should not be asked for. Consequently, what we are asking you to do is to bring in the sum of \$60,000.00, which, on the basis of these figures we have given you, we believe to be a reasonable computation of the pecuniary loss that Mrs. Hutchison, his widow, has suffered by reason of the failure of the Pacific-Atlantic Steamship Co. to provide Scotty Hutchison with a safe place to work.

In other words, ladies and gentlemen, to simply summarize what we have endeavored to present to you, is that the Pacific-Atlantic Steamship Co. is under a duty to provide a reasonably safe place for this man to work. We believe they violated that duty by not providing adequate illumination—a simple thing—by not providing screens, by not providing the type of safety or protective devices they had right on their own ship.

We believe the evidence shows there has been definite damage and detriment caused here, and we believe, insofar as dollars and cents can be trans-

lated into pain and suffering, or just the reverse, we ask you to bring back whatever you deem to be a fair and reasonable verdict for the conscious [641] pain and suffering, and a fair and reasonable verdict for the pecuniary loss that Emma Hutchison has suffered by reason of this negligence.

The Court: Mr. Gallagher, you will come to the end of some phase of your argument. When you do that we will take the noon recess.

Now, I will take it either at 12:00 or if you want to carry on until 12:30, you let me know when you come to a good breaking point.

Mr. Gallagher: Thank you, your Honor.

May it please the court, ladies and gentlemen of the jury, counsel for plaintiff, I join with Mr. Simpson in reference to the proposition that you have been attentive. Obviously, under our system of government any citizen who sits as a judge is required by the nature of his or her duty and oath to be attentive, so that in the final analysis that is not any type of argument to address to a jury with respect to the evidence in the case.

For example, let's assume that any one of you happen to be a party to a lawsuit, and you came in and tried it before his Honor without a jury. You would expect him to be attentive, wouldn't you? He is a judge. So that it wouldn't be arguing the case to him to thank him for doing his duty.

I mention that because I want you to keep in mind the side issues, the extraneous things which have nothing whatever [642] to do with this law-

suit, which may have been mentioned in Mr. Simpson's argument.

And I want you to tar me with the same brush, if I argue things to you that aren't based upon the evidence which you have heard, and which you have seen. Then I ask you, from the bottom of my heart and conscience, to totally disregard it.

Now, I am going to say something that isn't based on the evidence, but I want you to bear with me. As you can tell, I am temporarily suffering from what may be a slight case of laryngitis. Therefore, like Demosthenes, but not using rocks in my mouth to learn how to speak clearly, I have a coughdrop in there and I want you to excuse me for the necessity of having to use them. I may even put one in my mouth during the course of my argument, but I know that you will not feel offended by that when you realize the necessity for it.

I am going to perhaps be a little bit disorganized in your minds with reference to some parts of the argument, but I ask you to bear with me in that, also. I may not start at what is the logical beginning, but if I fail to do so it is because I want to comment on two or three things perhaps before we get into the meat of the situation.

The first thing I want to call your attention to is this: I do not intend to argue the question of damages or [643] the subject of damages, and the reason I do not intend to do that is that I will contend by argument, submitted to you, that there is no liability upon the part of my client for damages.

But just to call your attention to how far the plaintiff would want to lead you, let's take Mr. Simpson's suggested figure to you. If you gave this lady what he asks for, if you decide she is entitled to anything under the law and the facts, and she invested it in good common stocks or in other good investment, what percentage per year would she collect, and how much would be left to distribute to her relatives at the end of her life?

Now, that is all I am going to say about that subject. And I would like to ask each one of you to please remember this: When I conclude my argument for the defendant I cannot answer anything which Mr. Simpson may say to you in his closing argument. So whatever he has to say about any subject in this case, it was his duty to say before my time to argue commenced, unless he says it solely in answer to something that I say.

Now, we will hear the judge give instructions when we are all through with the arguments. But I would like to take you back to your impanelment. Each one of you told me that if you were accepted as a juror you would perform your duty under **your oath** as a judge. [644]

Now, a judge cannot be partial. A judge cannot predicate his finding upon sympathy for a widow or for anybody else. A judge cannot decide any disputed issue of fact upon speculation, surmise or conjecture.

A judge must decide the disputed issues of fact submitted to him, and you are a composite judge, upon the direct evidence which has been intro-

duced before you and which you have heard from the witnesses, either by way of deposition or from the witness stand, where such witnesses testify to things which constitute direct evidence, as, for example, there might be a dispute about whether Mr. Simpson happened to be in this room at this time. I might be called as a witness to testify under oath to that fact.

Somebody might claim that Mr. Simpson parked his automobile at a quarter to 12:00 down in front of the courthouse, and he may get a ticket on it. He would defend himself and say he wasn't even there. And he puts me on the stand as a witness. I take an oath and I say, in answer to questions, "I was in Judge Tolin's courtroom at that time and I saw Mr. Simpson there at that time."

Now, that is direct evidence. But you don't have to infer anything. Let's assume that I happened to be outside of the courtroom in a place where I could watch all means of exit from this room, out through his Honor's chambers or out through this door (indicating) and, say, I had been out [645] there from 11:30 until 12:00 o'clock. And I got on the stand as a defense witness and I was asked what I was doing, and I testify, "Well, I was out in the hallway, right in front of Judge Tolin's courtroom."

"Well, did you see the hallway leading from Judge Tolin's chambers, in other words, the back exit from the courtroom?"

"Yes."

“Was that under your observation at all times?”

“Yes.”

“Was the door leading from the courtroom under your direct observation all the time?”

“Yes.”

“Did you look away from that area at any time?”

“No.”

“Did Mr. Simpson come out of that courtroom at any time while you were out in the hall?”

“Yes.”

“What time did he come out?”

“Oh, he came out at 12:00 o'clock noontime.”

“Well, by the way, did you see Mr. Simpson go into the courtroom?”

“Yes, I saw him go in at 11:00 o'clock, or after a recess.”

You asked me if I had been out there from half-past 11:00 to 12:00. I said yes, but I was out there before. I [646] was out there at 11:15 when I saw him walk in the door.

Now, that would be testimony under oath from a witness, which would be indirect evidence, because from the positive testimony which I give, which doesn't prove in and of itself Mr. Simpson was in this room, any fair-minded jury, if it believed me under oath, would or could infer from what I told them that Mr. Simpson could not have been out on the street at a quarter to 12:00. That is indirect. It is proof of one fact by a witness under oath, from which the ultimate fact in issue may be logically inferred. In other words, it is an

inference which a reasonable mind would deduce from the testimony which I had given.

Now, in this case Mr. Simpson tells you that he wants you, under your solemn oaths as jurors, where you said you would restrict yourselves to the evidence introduced in this case, as guided by the instructions of the court, he asks you to do this:

He tells you about some theory, he says, "We think what happened is this:" and, parenthetically, I will not refer to the deceased by any nickname; I will call him Mr. Hutchison.

He tells you that Mr. Hutchison at 11:00 a.m. on April 24, 1951, came up this ladder in the escape shaft and that at the time he came up the ladder the masthouse was in total darkness, and that when Mr. Hutchison got up here he took hold of this, and then he reached up and he took hold of this, [647] and not being able to see, and not knowing where he was or what was going on, he went through—(indicating)—he wasn't watching him up here (indicating), but the only two or three ways that, even theorizing, could support Mr. Simpson, he either struck his head between the top of this bulwark or steel plate, which goes down to the bottom of the two shafts and separates them, or he put his head through, between the second rail and the top rail, or he got up here and put his foot on the middle rail and then lost his balance (indicating). That is what they want you to guess about. That is pure, unadulterated speculation.

If the court tells you, as I believe his Honor will, that your verdict in this case, in all respects, must be based upon evidence, direct or indirect, and if he defines direct and indirect evidence to you ladies and gentlemen of the jury, you cannot, I respectfully submit to you, say under your oaths as jurors, that there is any evidence whatever in this case to prove that Mr. Hutchison did what Mr. Simpson wants you to say when you come back here and look us all in the face, "We and each of us tell you, Lasher Gallagher, and tell you, Raymond Simpson, and tell you, Judge Tolin, that we have found direct or indirect evidence which has been introduced into the record in this case before us, that Nathanael Patrick Hutchison came up that ladder at 11:00 o'clock a.m.; that he didn't know what he was doing; that [648] the masthouse was in total darkness and he couldn't even tell that there was any difference between the distances between the rungs of the ladder or the shape of the ladder, and that he took hold of this plate here at the top of the separating bulkhead with his hands (indicating), and he thought it was a rung of the ladder; that he then, not being able to see, reached up and felt around and he got hold of the middle course of this pipe railing and he thought that that was the next rung of the ladder, and that he kept on coming up the ladder with his feet, and that then he reached up and he took hold of the top course of the pipe railing and he thought that that was the top rung of the ladder, so he kept

on going up and he got to the point where he toppled into the ventilator shaft."

Now, I ask you, in all sincerity, can any one of you conscientiously do that? I will suggest to you one reason, which is absolutely and totally against any such supposition.

You see, there is no evidence of it, no evidence or proof of the fact that the man's body was found in the bottom of the ventilator shaft on April 30, 1951. Of course, we know he was there, but that, we will say, is an example of indirect evidence. His body was there.

But can you reasonably infer from that single factor that he fell into that shaft at 11:00 o'clock a.m. on April 24, 1951, or that at 11:00 o'clock a.m. on April 24, 1951, [649] the masthouse door was closed, or that on April 24, 1951, no light was coming in through the hollow tubing of the ventilator? With all of those things in there, are you going to accept the suggestion that Mr. Simpson made to you, about this 11:00 o'clock a.m. proposition?

Mr. Simpson even denies the veracity of one of his own witnesses, in order to attempt to get you to render a verdict for the plaintiff.

When Mr. Simpson, representing Mrs. Hutchison, offered and read the deposition of Ernest Kalnin, which was taken under oath, the plaintiff vouched for that man's integrity and veracity. Now, what did that man say?

And ladies and gentlemen of the jury, if you have any doubt upon the proposition, that when a

witness is offered by any party in a civil or criminal case, that the party who puts that testimony on under oath before you, either by way of deposition or by way of oral testimony, vouches for the veracity and integrity of the witness.

I will guarantee that the judge will tell you that the party does vouch for the veracity and integrity of witnesses produced by him or by her. And it does not lie in the mouth of the attorney who offers sworn testimony of his own witness, his own client's witness, to thereafter get up before a jury and say that witness didn't know what he was talking about, unless there is some evidence in the record to support [650] an argument of that kind.

Now, what did Mr. Kalnin say? You recall that Mr. Simpson told you that Mr. Kalnin was confused on cross examination by Mr. Gallagher, with reference when he last saw Mr. Hutchison.

Now, I want to call your attention to a couple of things. Mr. Simpson was present at the time that Mr. Kalnin gave his deposition. Mr. Simpson saw the oath and heard the oath being administered to Mr. Kalnin.

Mr. Simpson asked Mr. Kalnin all of the questions which were asked on behalf of the plaintiff during the taking of Mr. Kalnin's deposition.

And on direct examination by Mr. Simpson, this is what happened on that subject:—I will start on page 4, Mr. Simpson, at line 14——

“The Witness: There was Hutchison and four other sailors and myself down in that hold.

“Q. What did you do with reference to this group?

“A. I told them what to do and laid out the work.

“Q. Can you be specific as to the time of day?

“A. That was about 8:00 o'clock in the morning and we turned to in No. 3 hatch. The first thing we did there was open one section, aft section of No. 3 hatch. There's a ladder there and there's also a ladder in midship house. You can use either way to go [651] down that hold.

“Q. Now, what happened after you gave these orders, that you observed?”

“A. Well, I already told you, went down by the hatch and went to work.

“Q. For how long did you work?

“A. Until 10:00 o'clock.

“Q. Then what did you do?

“A. Then we stopped and went for coffee.

“Q. Then what did you do?

“A. At 10:15 we went back in to clean up again, finish the job.

“Q. How long did you work?

“A. Worked until dinner.

“Q. How long was that?

“A. Knocked off about ten to 12:00. Always give time to clean up.

“Q. For how long did you observe Mr. Hutchison working in this hold?

“A. He worked until dinnertime.

“Q. Did you observe Hutchison leave the hold?

“A. He left to come up dinnertime. He left

about ten minutes to 12:00, the same as the rest of the gang.

“Q. Was there any occasion thereafter when you [652] observed Mr. Hutchison?”

I am stopping reading now because I wanted to interject something in a parenthetical way. The word “thereafter” in that question asked by Mr. Simpson obviously referred to after the time he saw Mr. Hutchison, come up at ten minutes to 12:00, which is only ten minutes before noontime and which is fifty minutes after 11:00 o’clock a.m. Resuming the reading:

“Q. Was there any occasion thereafter when you observed Mr. Hutchison?”

“A. Well, I seen him once more after that, coming from the mess room.

“Q. Did you observe anything in particular about him? “A. No.

“Q. When was the next time that you observed Mr. Hutchison?

“A. That about—in Philadelphia, I believe.

“Q. About Philadelphia?

“A. In Philadelphia.

“Q. When was that?

“A. That was when we found him then.

“Q. What date was it, approximately what time?

“A. Before arrival in Philly on April 30th, about six days later.”

That ends, Mr. Simpson, on page 6, line 16. [653]

Now we get to the cross examination, where he was confused by my cross examination. And keep

in mind, ladies and gentlemen of the jury, when Mr. Simpson referred to this testimony about Mr. Kalnin having stated one time he saw him in the mess room at noontime and the other time he saw him just coming out of the mess room, he was talking about that for the purpose of having you find that Mr. Hutchison came up out of that shaft at 11 o'clock a.m., as Mr. Amundsen said, and never did go into the mess room for lunch. In other words, that was his purpose, to take you by the hand and have you ignore Kalnin's testimony that he saw Hutchison come out of that hold at ten minutes to 12:00, because he couldn't possibly get anybody who can sit on a jury to find that Mr. Hutchison was involved in an accident at 11 o'clock a.m., if he was observed by a witness whom you believe coming up out of a hold at ten minutes to 12:00.

And when you are considering the effect that an argument may have on you, remember that, as we all know, we can go back to sophistry, if any of you ever have studied philosophy, and I think you know what sophistry is. A sophist is a person who can make what appears to be on the surface a very reasonable statement, but if you probe into the background of it you find out it is specious. And an argument based on a couple of questions asked by me of Mr. Kalnin, which showed that on the Coast Guard hearing on May 1, 1951, this deposition [654] of Kalnin having been taken on May 17, 1952, over a year afterwards, solely with reference to the place where he had seen Mr. Hutchison,

you get to cross examination where, by my cross examination, he was confused——

Mr. Simpson: Page 21, Gallagher.

Mr. Gallagher: Thank you.

“Q. Do you recall giving testimony at a Merchant Marine investigating unit of the United States Coast Guard at Philadelphia, Pennsylvania, on May 1, 1951?

“A. Yes, that’s where we went then.

“Q. At that time were you asked the following questions and did you give these answers:

“By Mr. Bikle:

“Q. You saw him at lunch?”

And parenthetically, remember this testimony before the Coast Guard is under oath, the same kind of an oath those witnesses took who testified here.

“A. I seen him at dinnertime but I didn’t stay long, coming out the mess room, just had a bowl of soup, started out of the mess room. I didn’t see him any more after that.

“Q. The last place you saw him was in the mess room?

“A. That was the last place, yes.

“Q. What was his condition regarding sobriety? [655]

“A. Was he sober?

“Q. Yes.

“A. Oh, yes, he was sober, slight hangover.”

Then my question, after having read that part of the record from the Coast Guard hearing:

“Q. Did you give those answers to those questions?

"A. Yes. He was sober that day, I know that.

"Q. But he did have a hangover?

"A. I guess so, from the night before—didn't feel good."

I stopped reading, Mr. Simpson, at line 9, page 22.

Now, isn't it quite obvious that on May 1, 1951, Mr. Kalnin might have had a clearer recollection of whether the last place he saw the man was in the messroom or just coming out of the messroom, than he would on May 17, 1952?

But aside from that, ladies and gentlemen of the jury, that is utterly immaterial. The fact is that their own witness under oath establishes as a fact, by direct evidence, that Mr. Hutchison came out of hold No. 3 at 10 minutes to 12:00. And if he did, it is utterly impossible for him to have been involved in any accident at 11:00 a.m. on April 24, 1951.

And all of the legal legerdemain witnesses might be concocted and all of the sympathetic legerdemainism which [656] there might be suggested cannot change those facts.

And, ladies and gentlemen of the jury, no lawyer should ask you to find that Nathanael Patrick Hutchison was involved in an accident at 11:00 a.m. on April 24, 1951, when he himself has not only heard the sworn testimony which utterly refutes any such proposition and he himself has read it to you as testimony under oath, which they ask you to believe.

Your Honor please, I am sorry I ran over 12:00 o'clock. I could have stopped. Your Honor knows I

have a one-track mind. I would have stopped at 12:00.

I am sorry it is almost 15 minutes past 12:00.

The Court: That is all right. We like counsel to come to a good breaking place. It is unfortunate when an argument must be broken someplace in the course of it for a recess.

Mr. Gallagher: I think the most unfortunate thing, your Honor, is that juries have to listen to arguments.

The Court: Will 1:30 be a convenient time or is it an inconvenient time? Will your voice be recovered by then, Mr. Gallagher?

Mr. Gallagher: It seems to be pretty good right now. It is all right with me. I can keep on going if you want, and finish, but——

The Court: Let's take the recess until 1:30.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same date.) [657]

November 21, 1955, 1:30 o'clock p.m.

The Court: The jury being present, you may proceed with your argument.

Mr. Gallagher: May it please your Honor, ladies and gentlemen of the jury, Mr. Simpson, I think I read enough to you from the deposition of Mr. Kalnin to demonstrate that, so far as his testimony is concerned, no accident happened at 11:00 a.m. on April 24, 1951.

Now, I would like to call your attention to Mr. Amundsen. You will recall that Mr. Amundsen was

an experienced seaman, having had, as I recall his testimony, at least 20 years' experience and perhaps 22.

And so that I will not consciously misrepresent anything to you, I will read what he said.

"Q. How long have you been going to sea?

"A. Twenty-two years.

"Q. That is your usual occupation, is it, as a sailor?

"A. Yes, A. B."

I believe you will recall that we stipulated that A. B. means able-bodied seaman.

Now, Mr. Amundsen testified that at 8:00 o'clock in the morning, "we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time. [658]

"Q. Do you remember what hold it was?

"A. No. 2."

Well, now, I don't think there is any question about the fact that they were in hold No. 3, because the evidence shows that this access shaft or escape shaft, as it is sometimes referred to, permitted access only into hold No. 3. But I don't think you should blame Mr. Amundsen, because he said hold No. 2. That really is not something for which a witness should be criticized.

Then he goes on:

"Q. And you were down in the hold?

"A. Yes."

These questions, ladies and gentlemen of the jury, were asked of the witness by a Mr. Kenady—K-e-n-a-d-y—who represented the plaintiff at the

time this deposition was taken in San Francisco on July 18, 1952.

"Q. Was Scottie with you?

"A. Yes, sir.

"Q. From 8:00 o'clock in the morning?

"A. Yes.

"Q. Would you continue with your answer? What happened next?

"A. Well, then we worked, and so the boatswain come and knocked us off there about 10:00 o'clock, 'Come up for coffee.' [659]

"Q. You say you came up for coffee. How did you come up from the hold?

"A. Well, we come up the access ladder there on the masthouse.

"Q. Where is that access ladder located with respect to the hold you were working in?

"A. It is on the port side.

"Q. You say it is on the port side?

"A. Yes."

Skipping the next question, and then the question:

"Q. And when you came up for coffee time you say you used that access ladder?

"A. The same—we come up—yes, sir, we come up the same way as we went down at 8:00 o'clock in the morning, through the access ladder of the masthouse ladder."

And at this point, ladies and gentlemen of the jury, I want to call your attention to a little conflict there which really doesn't mean much, but Kalnin, you will remember, testified that in the morn-

ing at 8:00 o'clock he saw Mr. Hutchison go down the ladder at the after end of hatch No. 3. That is in Mr. Kalnin's deposition.

"Q. You say they are all in the same place, is that what you mean to say? "A. Yes. [660]

"Q. Will you tell us what happened then? You went up for coffee time; did Scottie go with you?

"A. Yes, sir, and we walked on the deck together; went in and had coffee; were sitting there talking, * * *"

Then he testified they went into Scottie's home and sat down. When I say "Scottie" I am repeating his designation; that is not mine.

And he referred to the fact that he had—that Mr. Hutchison told him he had money and he wanted to go out that night, he could go and Mr. Hutchison would lend him the money, and then Mr. Amundsen could pay him back.

That has nothing to do, however, with the facts of the case. I merely want to tell you what I am leaving out.

"Q. And while you were with Scottie in his fore-castle, and smoking, did you have an opportunity to observe his condition as to sobriety?

"A. He was sober,——"

Was any of the rest of that answer read, Mr. Simpson, on page 9?

Mr. Simpson: Lines 12 and 13——

Mr. Gallagher: I mean the answer on lines 6 and 7.

Mr. Simpson: No.

Mr. Gallagher: I have read all that was read?

Mr. Simpson: Yes. [661]

Mr. Gallagher: "Q. And were you sober that morning?

"A. Yes, sir, I didn't even go ashore."

Now, what significance would a reasonable person draw from that last sentence? Mr. Amundsen was asked whether he was sober. He, Amundsen, was sober, and he said, "Yes, sir. I didn't even go ashore."

Can you reasonably infer that Mr. Amundsen said he was sober and gave as the reason for it the fact he didn't even go ashore? Why, otherwise, should Mr. Amundsen, when merely asked the question, "And were you sober that morning" why didn't he just say, "Yes, sir."

Why did he add, "I didn't even go ashore"?

And, of course, whether Amundsen was or was not sober is not a determinative fact in this case, but I am reading you what he said. And I am reading you the questions that the plaintiff's lawyer asked of Mr. Amundsen.

"Q. Now, would you tell us what happened after you finished coffee?

"A. Well, then the boatswain come and said, 'Well, boys, let's go.' So, we went back the same way, down the shaft alleyway, I call it, you know, aboard the ship.

"Q. You went back the same ladder that you came up?

"A. Yes, and we start working again like we [662] did before all morning, same thing, cleaning

holds, sweeping and picking up papers, and making a pile over there so when they open up the hatches they take it out and put it on deck.

“So—well, we were working there, so Scottie says, ‘Well, I’m going to go up on deck and get a drink.’ So, he walked back there where—I saw him walk up, because I saw him go out the door and walk up the ladder, and so we worked there. So, well, we went up for lunch—to eat dinner. That was about, you know, around 11:00. The boatswain came in and knock you off, so we went up on deck the same way. We walk up the same—you know, up and down all morning. So, we went and washed up and went in the messhall and eat dinner.

“Q. And did you go back down in the hold to work after dinner? “A. Yes.

“Q. Was Scottie with you? “A. No.

“Q. When was the last time that you saw Scottie?

“A. Well, that was around 11:00 o’clock or something like that.

“Q. That was when he came back down into the hold with you, after coffee time? [663]

“A. That was at 10:30.

“Q. At 10:30, and it was sometime later, but before lunch, that Scottie went back up?

“A. Yes.

“Q. Did you notice what route he took?

“A. The same way.

“Q. Through the door? “A. Yes.”

And I call your attention to what is a leading question. This isn’t the witness’ language. It is a

leading question, putting words into his mouth by the attorney who asked the questions, Mr. Kenady.

“Q. And that is the last you saw him?

“A. Yes.”

And next question, “And did you say anything to him as he left?

“A. I can’t remember now.”

Next question, “When did you next see Scottie after this?”

Notice, ladies and gentlemen of the jury, this question doesn’t put the words into the witness’ mouth. It is a question asking for information, depending upon the recollection of the witness, without a suggestion of what the answer should be. I will repeat the question:

“When did you next see Scottie after this? [664]

“A. Well, I may have seen him up in the dining room, I’m not sure.”

That is on page 11, lines 8 to 10 on the direct examination; not cross examination.

Now, we go over to the cross examination, where Mr. Schaldach, who took my place for this deposition up in San Francisco, this deposition of Mr. Amundsen’s, and we will find out what he said about that same subject. Page 25, Mr. Simpson.

Mr. Simpson: Thank you.

Mr. Gallagher: “Q. How long after you came back down there was it that he told you he was going to get a drink?

“A. Well, let’s see. We come down there, I’d say—I’d say at 10:30, after coffee time, and I’d say, oh,—well, 10:00—I mean, 11:00 o’clock.

“Q. About 11:00 o’clock?”

“A. Yes, something like that.”

Repeating the answer, “Yes, something like that.

“Q. And you saw him go through the door in the hold? “A. Yes.

“Q. That door leads to this escape hatch?

“A. Yes. [665]

“Q. And that is the last you saw him?

“A. Yes.

“Q. Did you notice whether or not he came back down? “A. No, he didn’t come back.

“Q. All right. Did you see him at lunch time or supper time?

“A. I’m not sure, because, you know, we all wash in there, you know; hungry, and what have you, you know. Sit down and, you know, start to eat.

“Q. What do you call your noonday meal?

“A. Lunch, or——

“Q. Lunch. All right. What time did you come up the hatch, this escape hatch, for lunch?

“A. About 11:30 or 25 minutes to 12:00.

“Q. I see. And is it your recollection, Mr. Amundsen, that you did not, at any time after 11:00 o’clock, see Hutchison?

“A. Well, I’m not sure if I saw him for lunch. I wouldn’t swear to that.

“Q. You wouldn’t swear to that? “A. No.

“Q. Could it be possible that you may have seen him for lunch? [666]

“A. Yes, sir, yes, sir.”

Now, I respectfully submit to you ladies and

gentlemen of the jury that when you take the testimony of Kalnin and you take the testimony of Mr. Amundsen, it would not be a fair and impartial finding on the part of the sworn judge to say from that evidence that the plaintiff has proved, by a preponderance of creditable evidence, that Mr. Amundsen was involved in any accident at 11:00 a.m. on the morning of April 24, 1951.

You may wonder what this is all about. '51, isn't that the right date?

A Juror: You said Amundsen. You mean Hutchison.

Mr. Gallagher: Excuse me. Mr. Hutchison. I am glad you called my attention to that.

No impartial judge would take that evidence, ladies and gentlemen of the jury, at least, I don't see how any impartial judge could say, under his oath say from that testimony Mr. Hutchison was involved in any accident at 11:00 a.m. on April 24, 1951.

You may be wondering why this is of any importance. I will try to tell you. The plaintiff, as I think the judge will tell you, must prove by a preponderance of evidence, regardless of all else, that Mr. Hutchison suffered a personal injury in the course of his employment.

Now, unless you can come back in here and tell us under [667] oath, as jurors, that this evidence proves that Mr. Hutchison fell into that shaft at 11:00 a.m. or about 11:00 a.m. on April 24, 1951, I don't see how you can say that he suffered any in the course of his employment. That is why they

want you to find that an accident happened at 11:00 a.m. on April 24, 1951.

As I understand Mr. Simpson's argument, he admits that Mr. Hutchison did not go into the masthouse from the top or from the bottom at any time between 1:00 p.m. and 3:00 p.m. on April 24, 1951.

If he doesn't admit it, it doesn't make any difference, anyhow, because the evidence is without conflict that he did not. Mr. Amundsen, their witness, under oath says he and the rest of the gang, excepting Mr. Hutchison, went back down the ladder in the masthouse at 1:00 p.m. and that they—and Mr. Kalnin says they quit work at 3:00 p.m., and all of them came back up.

Mr. Kalnin testified he was standing at the winches. Captain Dyer told you—and this is without conflict—that standing at the winches means that Mr. Kalnin was here at the after end of Hatch No. 3 (indicating).

That is just like you ladies and gentlemen are there and I will go over there (indicating). Here is a masthouse door (indicating). It is on the wrong side of the ship because it is a starboard, but if I had to walk between you [668] and this door to get in, don't you think you would be able to see me?

We proved without conflict that a man standing at the winches here (indicating) at the after end of hatch No. 3, would have a clear and unobstructed view of the entire deck of the vessel forward of that point.

Nobody could get into that masthouse door without walking through it, from the deck. Mr. Kalnin

told you that he did not observe Mr. Hutchison anywhere on deck at any time after he saw him coming out of the messroom or in the messroom.

Now, Mr. Kalnin was there at the winches. Mr. Dyer told you that a man at the winches would be facing forward. He would be looking right in that direction. That is, his face would be pointed that way (indicating).

Of course, momentarily he might look down in the hold or the hatch. Well, are you going to believe that Mr. Hutchison could have run across the deck and run into that masthouse door without Kalnin seeing him between 1:00 and 3:00?

Of course, we have got the positive testimony that he didn't ever go down in the hold after 1:00 o'clock. He didn't show up at 1:00 o'clock to go to work.

Now, it isn't our burden to prove these things. The court will tell you, I am sure, that with reference to every material issue of fact in this case, excepting that of [669] perhaps contributory negligence, the burden of proof is on the plaintiff.

Now, you ladies and gentlemen of the jury have enough experience and enough common sense, without any judge telling you so, that the only way you can sustain the burden of proof is to produce witnesses who can tell the jury about it, or produce written things which tell you about it. There is no burden on the defendant in this case to prove how, when or why Mr. Hutchison got into that ventilator shaft. And if you think, or doubt that, if you think otherwise or doubt it, you ask the judge whose

burden it is in this case to produce witnesses to prove when, how and why Mr. Hutchison got into that ventilator shaft.

You will recall in that respect that I put Mr. Simpson on the stand and I asked him if more than three years ago he had been furnished with the names and addresses of all of the members of the crew, and he said he thought he had. That testimony is proof of the fact that the plaintiff did get the names and addresses of every member of the crew.

They have taken the depositions of two of them, Amundsen and Kalnin. Kalnin testified there were four men, in addition to Mr. Hutchison, in that hold on the morning of April 24, 1951.

Under our system here in the Federal court a deposition of a witness may be taken on written interrogatories. That [670] means simply that the lawyer representing the party in his office dictates to his stenographer a series of written questions. It is a very simple matter to procure an order. It is issued *pro forma*. You don't even have to worry about it. It is an order signed by the judge appointing a certain notary as a commissioner. If the witness happens to live in Philadelphia or Timbuctoo you appoint a notary as a commissioner. All you do is send the written interrogatories to the notary.

The witness either appears voluntarily or you get a subpoena issued from the court where he lives, take his deposition at that place. He has to come in and he writes out his answers to those written interrogatories. No lawyer is necessary at all.

So that we have evidence here there were four other men in that hold besides Mr. Hutchison. That means there were three in that hold besides Mr. Amundsen. If the plaintiff really believed that she could prove that Mr. Hutchison left that hold at 11:00 a.m. and nobody ever saw him after that and wanted to make it certain, the other three men who were working down there were available, because when you prove that a man is alive, the presumption is that he remains living until somebody proves he is dead.

Therefore, the presumption in this case is that the other three seamen, who were down there in the hold with Mr. [671] Hutchison that morning, are still alive.

We introduced in evidence the Shipping Articles, which give the names and addresses of the A.B.s who were signed on the Articles. Those Articles, under the law, are required to be filed with the Shipping Commissioner when the voyage is over. So that the Shipping Articles weren't something we could hide or cover up. All the plaintiff's attorney had to do, to find out the names and addresses of all of these men, would be to get a copy of the Shipping Articles, the same as I have got, a photostatic copy here. But they didn't do it.

Now, Mr. Simpson will say, "Well, they didn't do it, the defendant didn't do it."

My answer to that, ladies and gentlemen of the jury, is so what? Whose burden of proof is it? Who is under the burden of proving when this accident happened and how it happened and why

it happened? It rests throughout the trial of the case upon the plaintiff.

So much for depositions by written interrogatories. Let's talk about this so-called place of work. I will try to be realistic and practical, which is sometimes hard for a lawyer, as you know.

But what was the place of work in this case, under the evidence? The only testimony about the location of the place where any work was done by anybody was down in hold No. 3. Mr. Kalnin says it was on the deck called the shelter [672] deck, which is immediately below the main deck. That was the only place where there was any work done.

To call the masthouse a place of work is purely an error. The deck of the masthouse, between the door and the ladder, was a route or means of getting to the place of work. The ladder going down the escape shaft was not a place of work. There isn't one word of evidence in this record showing or from which impartial sworn judges could find that Mr. Hutchison did one tap of work in the masthouse or in the ventilator shaft or in the escape shaft.

Now, I contend that common sense dictates that the deck of the masthouse and the ladder were merely a means of getting to the place of work. But the evidence shows that the masthouse and the ladder were not the only means of getting down to the deck below or from the deck below up to the main deck.

There is no evidence whatever in this record showing that Mr. Hutchison was under any compul-

sion whatever to use the ladder in the masthouse, either for the purpose of going down or coming up, because the testimony of Kalnin shows that the after part or after section of hatch No. 3 had been removed, and that there was a ladder there, attached to the after hatch coaming.

I have in mind the fact Mr. Amundsen testified the hatch was closed. But how in the world, ladies and gentlemen [673] of the jury, could the dirt slings be lifted out of hold No. 3 by Mr. Kalnin standing at the winch, unless the after section of the hatch had been taken off, the hatch cover? You just don't lower a dirt sling down through this hatch cover and then pull it up. You have got to have an opening there, so that common sense tells us that when Mr. Amundsen testified that hatch No. 3 was closed he was mistaken.

That is all there is to it, because you cannot use winches on a ship to lower a dirt sling and pull it out unless there is a hole there through which you can do that, and I don't see how any impartial sworn judge could find that the after section of hatch No. 3 had not been removed, as Mr. Kalnin said it had been removed.

So that Mr. Hutchison had a free choice. He could come up the ladder at the after end of hatch No. 3 or he could come up the ladder in the escape hatch and so could all the rest of them. I have in mind Mr. Kalnin's testimony, when the winch is in operation, that is, when the winch falls the cables are lowering a dirt sling or pulling one out and the men don't want to use the ladder at the after end

of the hatch because there is danger of getting hit.

But you know, as well as anyone, that when men are down in the hold of the ship cleaning up a hold, it takes time to fill the dirt sling sufficiently full so it is worthwhile to pull it out. You are not taking it out in scoops or in ice [674] cream cones or in pint buckets, or anything of that kind.

It just—let's be practical about it. You have got a big sling, canvas or whatnot. You remember Captain Crawford testified on that subject. So that the winch wouldn't be in operation and wouldn't be lifting anything out until a dirt sling was filled up. And when it is pulled out, where do they put it? They wouldn't dump it on the deck of the vessel, because it is dirt. They would probably put it out on the dock.

I am sorry I said that. I don't know where they put it. I want to argue only the evidence to you. I don't know where they put the dirt. I withdraw my surmise they put the dirt out on the dock.

In any event, they took it out of the hold and put it some place. That would take some time. Between even lowering and raising of a dirt sling, isn't it obvious that the winch would be quiet? They are not going to pull it out, unless it has something in it, and they are not going to put it back unless it is empty.

So that during the intervals, when the winch is not in operation, there is no possible reason for not using the ladder at the after end of the hatch to do it.

Likewise, when they knock off the testimony

shows they all knock off. When the sailors down in the hold knocked off, Kalnin knocked off, too. He said, "We knocked off at [675] 10 minutes to 12:00. We knocked off at 10:00 o'clock." So somebody is operating the winches when they knock off and so anybody that wants to come up the ladder at the after end of the hatch No. 3, he can, and then he can go down that way until they are ready to use the winch again.

That is of importance here, or, at least, of some importance for this reason: We have five experienced, able-bodied seamen; maybe a couple of ordinaries. Amundsen, I think, said something about a couple of ordinaries.

In any event, you had five men down there who had been making their living at sea; they were seamen. Amundsen was an able-bodied seaman, Mr. Hutchison was an able-bodied seaman.

Those men, with all of their experience, voluntarily and without any compulsion whatever, without any order to do so, used the ladder in the mast-house to come up and go down. Kalnin said maybe some of them went up the ladder at the after end of the hatch, but those who used the escape shaft ladder used it because they were convinced by their own experience that it was safe to use.

They saw nothing about it which indicated to them or any of them that it wasn't perfectly safe for them to use. And I say that because if they had seen anything wrong with it, they wouldn't have used it.

Now, with reference to the degree of visibility

in the [676] masthouse on April 24, 1951, which is the important date, what have they proved? What witness testified that there was anything whatever the matter with the visibility actually in the masthouse when this vessel was at Baltimore, Maryland, on April 24, 1951? That is the date when they claim Mr. Hutchison fell down that shaft.

When they took Mr. Kalnin's deposition, they didn't ask him a single question about the condition of visibility, degree of visibility in the masthouse, or in the shaft where the ladder was; not one single question.

When they took Mr. Amundsen's deposition, they did not ask him one single question and he gave no answer to any question read to you with reference to the degree of visibility in the masthouse on April 24, 1951.

Now, one single question. They make a big point out of the proposition that there was no permanent electric light fixture inside the masthouse. Well, let us use a practical example. Suppose you go home tonight, you go down and get on a bus at 4:15. We will say it is broad daylight, and you walk in the bus and you are looking down the aisle and because you—if you don't look down at the floor, you step on a banana peel and you fall down; you hurt yourself. So you sue the bus company.

And your attorney makes a big point out of this proposition: We will assume there are no electric light bulbs in [677] the bus at all. Can you tell me what difference it would make in broad daylight? It seems to me, as a matter of everyday common

sense, which even a 10-year-old kid would readily grasp, that it is unimportant whether there are or are not permanent electric light fixtures inside of anything, in the absence of some legal evidence showing that the actual degree of visibility within the place at the time in question was such as to make it necessary to have a substitute for whatever natural light there was.

They ask you to find, under oath as judges, upon the evidence which has been introduced here, that that masthouse at the time or immediately before the time Mr. Hutchison fell into or got into the ventilator shaft was so dark you couldn't see your hand before your face two feet away.

Where, I ask you, is the evidence of it? What witness has testified that on April 24, 1951, at Baltimore, Maryland, you couldn't see everything inside that masthouse with clarity and ease at any time between 8:00 a.m. and 3:00 p.m. on that day? What witness has told you that the door was closed at any time between 8:00 a.m. and 3:00 p.m.?

Mr. Amundsen, their witness, under oath told you he opened the door to the masthouse. And then came up at 10 minutes to 12:00. There is no suggestion here that anybody had to open the door to get out of the masthouse.

They went back down at 1:00 o'clock, according to [678] Amundsen. He didn't say when his deposition was taken, and they didn't dare ask him, evidently, because they wanted to keep that thing in a rather nebulous state, but he didn't say they had

to open it again, and you don't have to open anything unless it is closed.

You can see that that is a heavy door, a heavy steel door. The ship is tied to a dock. The log shows that the weather was practically perfect.

Now, I suggest to you ladies and gentlemen of the jury that the request made of you to come back in here and tell all of us, under your oaths as impartial judges, that you can find in the evidence here a foundation for saying that at the time or immediately before the time Nathanael Patrick Hutchison got into that ventilator shaft that masthouse door was closed, no light was coming in through the ventilator cowl, and that was the condition that existed at the time he got into it or fell into it.

Can you do that? Can any one of you tell me what witness testified to any fact from which you can say that masthouse door was closed and that the thing was dark?

Now, we are not all alone in this thing. You and I and Judge Tolin and Mr. Simpson and Mrs. Hutchison own that vessel. The evidence shows that it is owned by the United States of America, Department of Commerce. It was built by the United States of America, Department of Commerce. The evidence shows it was built in 1945.

Now, we know from the evidence here that a good many of those Victory ships were used during the war, the last war, with many seamen on them, and went to many ports.

The Government has never gotten the idea there

was anything the matter with the inside of that masthouse. The Government has never gotten the idea that there was any necessity for any permanent electric light fixtures in there.

The Government knew on April 30th and on May 1, 1951, that Nathanael Patrick Hutchison had been found at the bottom of the ventilator shaft on this vessel. The evidence here—excuse me a moment.

May I take time out, your Honor, to get another coughdrop?

The Court: Yes. Do you want a recess?

Mr. Gallagher: No. I would like to finish this, if I may.

The Court: When you want one, let me know.

Mr. Gallagher: All right. I will wait for that until we get the recess.

Here is Plaintiff's Exhibit, excerpts of part of the log book. Now, we get the entries under April 30, 1951:

"10:45 Unidentified body found in bottom of No. 2 after port ventilator trunk by M. L. Overman, Chief Electrician. Police notified. 11:00 Philadelphia City Police aboard, Waldron No. 3898, Wagon No. 262, Sixth District."

I am going to skip down here to 1700, "W. R. Sayer, Lieutenant Commander, U. S. C. G."—obviously United States Coast Guard—"Merchant Marine Investigating Unit, aboard investigating death of Nathanael P. Hutchison, deck maintenance."

Lieutenant Commander Sayer was there for two

hours on April 30th. He was not interested in the outcome of this case. What do you think he was there for? Do you think it is unreasonable to assume that a Coast Guard officer goes on board a vessel for the purpose of conducting a thorough investigation, to find out what was the cause of a death?

Now, the evidence shows that Lieutenant Commander Sayer conducted a further investigation on May 1st or May 2nd—May 1st, I think it was—May 1, 1951, where Kalnin testified under oath. That is where we got the excerpt, I used in cross examination of Kalnin, to refresh his recollection about the fact that he had seen him in the mess-hall during the noon hour on April 24th, and that at that time he formed the conclusion, **unfortunately**, the man had a slight hangover. In any event, you have that investigation.

In the light of that investigation, in the light of knowledge on the part of the Coast Guard, United States Coast Guard, charged with the duty of inspecting ships yearly, not [681] one single change was made in the SS Linfield Victory, not one single change in that masthouse.

There you have experts who are there for the purpose of safeguarding people who are on board the vessel. And the vessel is now relicensed. It is being operated by us. I say "us" because we, as citizens, own a piece of it. We have got an interest in everything that the Government owns.

Now, when Lieutenant Commander Sayer conducts a 2-hour investigation on April 30th, don't

you think he talked to everybody on board the ship? Don't you think he looked at everything? Isn't it a presumption that official duty is regularly performed?

And in the absence of evidence to the contrary, can you say that Lieutenant Commander Sayer came aboard the vessel, just went into the captain's quarters and someplace, and had a few highballs and left the vessel, or do you give him credit for being a decent, conscientious man, one who performed his full duty?

So with knowledge of the fact that a man, that the body of one man has been found in the bottom of one elevator shaft on one Victory ship, the Government, through the Coast Guard, doesn't make any change in it. The Government officers are of the opinion that there is absolutely nothing wrong with that masthouse. That it is perfectly all right for any seaman to use. Otherwise, the Government would [682] insist on changes being made.

Could we recess now, your Honor?

The Court: All right. We will take our afternoon recess.

(Short recess taken.) [683]

The Court: The jury being present, you may proceed.

Mr. Gallagher: Thank you, your Honor. Now, with reference to this question of visibility, they put on Mr. Wise, one of plaintiff's attorneys, and you recall that Mr. Wise was up there at Portland when they took these pictures.

Now, Mr. Wise is a lawyer. And Mr. Wise knows,

as a lawyer, that if a witness willfully and falsely makes any statement which relates to a material fact in issue in any case, that witness is guilty of perjury.

I laid that foundation with Captain Dyer. You recall I said to him, "Captain, do you realize that this vessel is now in the possession of the United States Government?"

"Yes."

"Do you realize that your testimony with reference to the visibility in that masthouse is a material fact in this case?"

And he said, "Yes."

And he testified under oath, as you heard him, that in the middle of August 1955, the vessel was exactly the same in so far as that masthouse is concerned as it was in April of 1951, and that with the door open it was light enough to read a newspaper, without any artificial illumination of any kind or character in the daytime.

He also told you under oath—and if this is untrue he can be sent to jail for perjury—he told you that this [684] ventilator cowl, with the door closed, and with the after hatch cover of No. 3 hold off, there was enough light in there for him to see the pipe railings and the two holes in the deck.

Now, when a man lays a foundation like that he never could say that he was mistaken about it. He couldn't say, "I didn't know it was material."

The Government has that vessel and the Government has a District Attorney who prosecutes for perjury. And with that knowledge, you saw the

kind of a man Dyer is. He is not going to stick his neck in a noose. There is no reason for him to do it.

He swore positively with reference to that degree of visibility, and I suggest to you that that kind of testimony is very strong. It is very creditable.

Now, Mr. Wise, you remember he wouldn't say under oath that standing outside of masthouse No. 2, without any artificial light in there at all, with the door open, he couldn't see everything inside clearly. He hedged a little bit. He said, "Well, you know, you can see generally," and so forth.

The important thing is he didn't give any negative statement. He didn't say you could not see in there with ordinary eyesight, without any illumination of an artificial nature. He would not go that far, because he knew the rule.

Now, Mr. Hutchison went down there on May 27, 1951, with [685] Mr. Simpson. Mr. Hutchison testified with the door partly open there was plenty of light in there, as long as it was daylight. He gave testimony with reference to both the door being open and closed.

Mr. Hutchison—were you shaking your head no?

A Juror: Hutchison?

Mr. Gallagher: Mr. John Hutchison, the brother. You know, we read his deposition.

A Juror: Was that '51 or '52?

Mr. Gallagher: May 27, '51. Mr. Hutchison and Mr. Simpson went aboard the vessel Linfield Victory; no testimony about any artificial illumination whatever.

Now, the plaintiff's attorneys were not hesitant

at all about getting on the stand under oath, when they wanted to prove that a floodlight was used to take certain pictures. If Mr. John Hutchison didn't know what he was talking about, there is another witness right there who was with him.

And there is one thing about this argument, ladies and gentlemen of the jury, I want to call your particular attention to. I say here that there isn't anybody in this courtroom who will get on that witness stand under oath and testify that he was on board the Linfield Victory, and that there was any door through which any light could have gotten into the inside of that masthouse, excepting the one single door, and perhaps an open door from the hold to the bottom of the [686] ladder shaft. Nobody in this courtroom will dare get on the stand and make any such statement.

I have been in the masthouse, and if the plaintiff would like to reopen her case, to permit anybody in this courtroom to get on the stand and swear under oath that there was any way for any light to get inside that masthouse, excepting through the ventilator cowl, excepting through this one single door or excepting through the bottom of the escape shaft, when the hatch is off and the door is open, they are welcome to reopen the case and I will tell you ladies and gentlemen there isn't anybody in this courtroom who dares so to testify under oath.

The reason I will call your attention to that is this: Mr. Simpson went to great pains to lead you in the right path, by telling you that Mr. Castle, when he said that with proper illumination or with

the doors—plural—wide open there was plenty of light in there and it was a safe enough place to work. You remember that?

He said with the doors, intimating to you that there was another door out here (indicating). He said, “You see, all these doors——” intimating to you that one of these other doors being opened would aid the illumination in the masthouse.

Ladies and gentlemen of the jury, that is a false lead and you don’t hear anybody asking leave to reopen the case to [687] testify to it, either. So that when Mr. Castle said under oath, this lady’s son-in-law, that with the doors—with the door—doors—call it doors, obviously means door—with the door wide open it was a safe enough place to work, that ruined their case. On their contention that the masthouse was not a reasonably safe place in which to go down to work and from the—or even a safe place to work, because Castle said with the doors open it was safe; that ruined their case.

It is quite obvious that Mr. Castle was referring to the singular door, because all the rest of the testimony shows that, for example, Mr. Hutchison, John Hutchison, when he was down there with Mr. Simpson, he said he closed the door, didn’t he? One door.

He said when he did that it was so dark in there you couldn’t see your hand in front of your face. And I hope that you are not going to follow that type of lead, and I don’t think you will.

None of us should permit our sympathy—we all have sympathy for the widow—if anybody here

wants to give her a hundred dollars, I will match you, but we are not here for that purpose. So that I ask you not to let your sympathy or your emotions or your heart influence you in making any finding of fact, because, after all, you have a solemn duty to perform. Let the chips fall where they will.

This is not a workmen's compensation deal. This is a [688] case where the plaintiff has to prove negligence on the part of the defendant, as alleged in her complaint.

Now, some more about this light business, if you haven't had enough already. Of course, you can't tell me, and I can't take a chance on not talking about it.

It is too bad that jurors can't say, "Hey, we have had enough of that. Why don't you go to something else? I am with you on that. Please quit." But you can't. You are in an unfortunate position. When you get a lawyer who hasn't got brains enough to know when to stop talking, you have to sit there and listen to it, and that is unfortunate. I wish we could see into your minds to see what you think is important.

Now, they talk about the fact Mr. Webb said it was necessary to put illumination in there to do part of their survey. That is easily understood. Part of their survey was to measure the distance from the deck down to the bottom of the shaft.

Now, obviously, if you are going to be meticulous and put a tape down there you want to know exactly when it touches the bottom, so you have to have some rather good illumination down there at

that point to enable you to know when the end of the tape hits the bottom of the shaft.

But take Mr. Wise, go back to him. They put him on. He refused to testify that standing outside of that [689] masthouse, with the hatch covers closed as they show in these pictures, he could not see the inside of that masthouse. That he could not see the holes in the deck, that he could not see the ladder and that he could not see the pipe railings.

He would not testify to those negative things, because he knew, as well as Captain Dyer does, this ship is a physical object which cannot be changed. You could demonstrate, by taking a jury to that ship in a criminal case, and letting them stand outside that masthouse with a door off and everything else closed, whether it was good or whether it was not good visibility in there. That could be proved to the point of demonstration, which you don't get very often in criminal cases even.

So you have to be careful when you are dealing with physical facts and ships, unless the ship sinks between now and the time the grand jury meets, or something, or the time such a trial happens, God willing it don't.

It is a good vessel. It has been at sea for a long time, so it will be there. So you don't take any chance monkeying with that kind of business.

None of you would testify this railing is steel, would you? Because it can be demonstrated it is not steel. You wouldn't testify that this hatrack is not here, because it can be demonstrated that it is.

Now, we have another example of the fact that it

was [690] perfectly safe to work in that masthouse. Somebody rigged that floodlight. Who did it? He had to work in the masthouse to do it, didn't he?

So it evidently was perfectly safe for whoever went in there and rigged that floodlight that Mr. Wise told you about. He didn't say the man had to use a flashlight to get in there to find out where to put this ladder or how to string this floodlight.

I hope I have said all I need to about that light. No, I haven't. I have to take that back. Amundsen testified that he saw—this is their deposition, remember,—he saw Mr. Hutchison's body in the bottom of that ventilator shaft at Philadelphia. Remember this is their witness and, ladies and gentlemen of the jury, there isn't a word in the complaint which says anything about light or lack of light; not a word.

All they say in the complaint is that the defendant neglected and failed to furnish safety appliances in and about a ventilator shaft, to provide a reasonably safe place to work. They don't say anything about lights not being in there.

If that was their theory, when they took Amundsen's deposition, why didn't they ask him what the visibility was? They do ask him if he saw Mr. Hutchison's body down in the bottom of that shaft at Philadelphia, and he said yes.

They didn't ask him if it was necessary to have any [691] artificial illumination to do so and Mr. Kalnin also saw the body down in the bottom of the ventilator shaft. He wasn't asked if it was necessary

to have artificial illumination to enable him to see the body down there.

If they are going to try to prove these things, why don't they ask somebody who is there at the time when they have a chance to do so, instead of just coming in with some theory?

And besides that, you have seen doghouses, haven't you, with these—I don't mean the ones the husbands get in, but rather doghouses out in the back yard. Take a doghouse big enough for an Airedale, we will say, and with a hole just big enough for the Airedale to get in, as is usually the case.

If the dog had your shoe in the doghouse, do you think it would have to have a flashlight to find it, if it was out in the back yard in broad daylight? If you went out to the doghouse, don't you think you could see throughout the breadth and length of the floor of the doghouse?

That may be a poor example. This door on the masthouse is certainly big enough in broad daylight, if you pay any attention to the laws of physics or the diffusion of light, to permit anyone to get in that masthouse, to permit him to do anything he wants, from reading a newspaper on up to anything else, and on down to anything else.

According to Mr. Kalnin's testimony, their witness, seamen and longshoremen used that ladder constantly. There is [692] no evidence any of them ever got hurt. If it can be used constantly, not only by seamen, but by longshoremen, what is the matter with it?

Mr. Wise didn't think there was anything wrong

with it, because he went down. He is not even a seaman. They want you to indulge in a presumption which, I think, the court will tell you exists. A presumption is whenever any man's lips are sealed by death the law presumes, in the absence of evidence to the contrary, direct or indirect, that such person exercised ordinary care and ordinary prudence.

Let me ask you this question: Would any ordinarily prudent seaman walk out of the deck of the hold, through a door, and climb up a ladder, when, upon looking up, he would see what they want you to believe, that the place was pitch-dark? Would an ordinarily prudent person do that? Would you do that?

Suppose you had a free choice of going upstairs in your house or somebody else's house, and you opened the door to one stairway and you look up, and you look up and it is just as black as the inside of a tunnel, with doors on both ends. You know there is another stairway and you take a look at it and it is perfectly light. Which one are you going to choose, if you are an ordinarily prudent person?

So I suggest to you that if you presume, as they want you to, that Mr. Hutchison was being careful about what he [693] did, how can you find, how can you find as jurors and impartial judges that he goes out there and, naturally, you look up. If it is so dark you can't see, you look up and you are not going to climb up there, are you?

Of course, that gets back to that 11:00 o'clock story, and I think we have conclusively nullified that, that this accident happened at 11:00 a.m.

There are other ways in which you could know what he had been doing, maybe. How was he dressed when he was found? Was he dressed in working clothes or in street clothes?

Talk about the burden of truth. You want to be satisfied that your verdict is just, if you bring in one against the defendant, don't you? It is up to them to give you enough evidence to make you fairly certain you are not making a serious mistake, because any mistake you make cannot be corrected.

Under our system if one witness testified to one thing and that one thing would be legally sufficient to support a verdict, and 150 witnesses testified to exactly the opposite thing,—this may seem strange to you, it seems strange to some lawyers, too, but, nevertheless, it is the rule—if a jury adopts the testimony of that one witness and renders a verdict in favor of the party whose contention is supported by the testimony of that witness, there is no appellate court in the United States would upset that verdict. So you have [694] a tremendous power, and having a tremendous power you also have a tremendous duty.

Mr. Simpson, I think,—I am not saying this positively—you have got 12 minds there and I want you to recall this for yourselves: Did Mr. Simpson tell you that Mr. Dyer had testified that there was a screen blocking the ventilator shaft on the starboard side of masthouse No. 2? Did he say to you they should have put the same kind of a screen in the masthouse on the other side, on the port side?

If he did, listen to this: Here is Dyer's testimony. The reporter wrote it up.

"Part of Cross Examination of witness Dyer by Mr. Simpson:

"Q. Directing your attention to Plaintiff's No. 4, I am going to ask you to step down and point something out to the jury, if you will.

"I call your attention to Plaintiff's No. 4, which has been identified as the starboard side of the mast-house of the Linfield Victory, and I ask you if you can tell me what this is starting up here, Captain (indicating).

"A. That is a reel for a heavy lift——"

That is this thing here, I think (indicating). That is what Dyer pointed to, as I recall it.

"Q. I misled you. I mean from the very top." Up here (indicating). [695]

"A. This is the cowl for the starboard ventilator shaft.

"Q. As that ventilator shaft goes down, how far does it go down in the Linfield Victory?

"A. Down to the lower hold.

"Q. The same as the one on the port side?

"A. The same."

Now, that answer doesn't mean that the ventilator shaft on the starboard side is the same in construction and design as the one on the port side. It simply means that the ventilator shaft went down to the lower hold on the port side, as the ventilator on the other side went down.

"Q. Looking in here, is there something which blocks that off or not?

“A. Yes; bulkhead. This shaft is not like this one here (indicating).”

Captain Dyer said “this” and he was pointing to this one here (indicating). “This one,” to wit, the starboard, is not like this one here (indicating), the one on the port side.

“Q. Plaintiff’s No. 1?”

That is the next one after this transcript says the answer was, “This shaft is not like this one here (indicating).”

The question is, “Plaintiff’s No. 1”?

See (indicating) ?

“A. This is not available from this end——
[696] starboard shaft is not available.

“Q. Captain, in your experience have you ever at any time seen a screen or a grate of any kind over a ventilator shaft on a Victory ship?

“A. Do you mean over the head of the shaft or over——”

And then the reporter didn’t write any more of it.

You look in here and you don’t see any opening at the deck level in the starboard side (indicating), but that is not the point in this case. The point is whether this one is a reasonably safe protection for a sober individual, in the full possession of his faculties and exercising ordinary care.

Watch what the judge tells you. Ask the judge if you have any doubt about it, whether the defendant owed any duty to make this thing safe for a man who was not exercising ordinary care for his own safety. If you have any doubt about it, you are entitled to and you should ask the judge that question.

Of course, we all know that nothing can be made

so that it is utterly impossible for anybody to get hurt. As a matter of fact, if you wanted to develop that to its ultimate, if they hadn't built the Linfield Victory Mr. Hutchison would never have been on it. If he hadn't been on it he wouldn't have been injured. If he hadn't been injured he wouldn't have [697] died. But that is not so simple as that.

Would any reasonable man anticipate—put yourself in this position—you never heard about this accident and you own a ship, you own the Linfield Victory and you go there, you know men are going down that ladder and coming up it, would you before this accident happened, and without ever hearing of any similar thing, have anticipated **that** some member of the crew in broad daylight, with the door open, would be likely to fall into that ventilator shaft with this pipe railing proceeding it? If so, indict the United States.

Look at the ship, around the edges of all of the decks are pipe railings. Keep in mind the fact that seamen are required to walk along those decks on the outside. Men have to maintain watches in stormy conditions, lots of times from the bridge.

Here you have got those pipe railings along the edge of the deck, above the main deck. The only thing that would keep a man from falling overboard, if you look here, you will see pipe railings along the starboard side of the deck, aft of the house (indicating), the deck immediately above the main deck. You can see the same thing at the very top here (indicating), up in the flying bridge.

Now, would you anticipate before the accident happened that a man is going to fall down that

shaft, if he is in the full possession of his faculties and he is perfectly sober [698] and he is exercising ordinary care, particularly, ladies and gentlemen of the jury, a man who had actual knowledge of the physical situation, because he did come up at least once before and went down at least once, because Amundsen said they came up that way for coffee and went down afterwards. So Mr. Hutchison on the morning of April 24, 1951, had used that very same thing and knew exactly what it was like.

Now, with reference to this Coast Guard certificate, I want to call this to your attention because this is issued by your representatives, mine. We have Congress and Congress passes laws. The laws require the Coast Guard to inspect vessels for safety. The Coast Guard is required to issue a certificate, if the vessel is all right, and not otherwise. And here it is for this particular vessel, issued 17 July, 1950, and expires 17 July, 1951. "Subscribed and sworn to before me this 28th day of July, 1950," and so forth.

Here is what it says up at the top:—I am not going to read it all——

"I hereby certify that the said vessel was built at Portland in the State of Oregon in the year 1945; rebuilt in the year blank; that the hull is constructed of steel; is provided with blank staterooms, blank berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection [699] laws and the rules and regulations prescribed thereunder; and is allowed to

carry blank passengers, 12 persons in addition to the crew," and so forth.

"The said vessel is permitted to be navigated for one year on the waters of oceans."

Now, then, there are certain particulars which are set forth in the certificate, but if you have any doubt about it, ask the judge whether the law enacted by the Congress,

"* * * provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, and has suitable accommodations for the passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, holds, life preservers, floats, anchors, cables and other things are faithfully complied with."

Ask about that part if you have any doubt about it. Ask his Honor if the law does not also provide that, "When the inspection of a steam vessel is completed and [700] the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by both of the Coast Guard officials signing it, before the Chief Officer of the Customs of the district or any other person competent by law to administer oaths."

In other words, the United States Government requires these inspectors to be so careful in their

inspection that they swear to it under oath, and if it is not true that is perjury.

So we have got the certificate. You have got the evidence that that particular vessel and all the other victory ships, which are owned by the Government and operated by Pacific-Atlantic, or owned by Pacific-Atlantic are inspected every year. They are inspected, not by the inspectors in Portland only, but in Seattle or every place the vessel happens to be when the certificate expires, so that these vessels, all being the same, are approved throughout the various ports in the United States by men whose sworn duty it is to see to it, with their experience as seamen, that everything about the vessel is safe and that it can be used with safety to life.

Now, that is of no moment whatever. Mr. Simpson tells you that. Or he probably will tell you that doesn't make any difference. No. [701]

The fact that the impartial Coast Guard officials, seamen, trained, inspect the vessel and approve it throughout, he says that is nothing. I think it is something. I think it is quite a bit.

And Captain Dyer told you that he knew, and he couldn't know excepting by observation, that these inspectors inspect these vessels throughout. They inspect the masts. They inspect these ladders. They inspect the whole business. So there is the evidence which you have.

Now, ladies and gentlemen, and because of remarks that have been made when you were not present, Mr. Simpson may refer to the notations in the log about April 25th and April 26th, where Mr.

Hutchison was marked A.W.O.L. this day. And he may attempt to convince you that the fact that the A.W.O.L. was there would indicate that Mr. Hutchison was an employee of the Pacific-Atlantic Steamship Co. on those dates.

Well, we know that is impossible, because they don't contend he was alive on the 25th or the 26th of April, and death terminates all such personal contracts. But, in any event, A.W.O.L. means absent without leave, so that any person, even if he is your employee, if he is absent without leave he is not acting in the course of his employment, is he?

That is a thing to remember. No. 1, was he actually an employee of the defendant from 12:30 p.m. on April 24th. [702]

No. 2, if you say he was on April 24th, after that, actually an employee, then was he acting in the course of his employment? There is no evidence that he went near this masthouse during those hours. When he got in there I don't know. I don't know whether you know.

If you had to say that Mr. Hutchison got in that masthouse on a specific date and a specific time, can you do it from the evidence? Can you say, under your oaths as jurors and as impartial judges, that Nathanael Patrick Hutchison got in that masthouse at 3:35 p.m. on April 24, 1951, or at any other particular time?

Now, if you can't say that, how can you say that when he got into it he was acting in the course of his employment?

I want to discuss the medical testimony with you.

Let's start at the beginning. Who had the very best opportunity to know how long Mr. Hutchison probably lived? This has only to do with their claim that he suffered conscious pain and suffering, because if that got in here it wouldn't make any difference how long the unfortunate man lived, from the time of his injury up to the time of his death. We will have to discuss it, because the judge is going to submit it to you for decision.

Dr. Glauser opens the man's head up, he opens his chest up. He is the man who sees the clot of blood.

He is well trained, according to his qualifications. He [703] hasn't been treating dead people—I mean, he hasn't devoted his professional life to dead people only. He has been a Commander in the United States Navy and he was in the South Pacific, according to his deposition, and he was, I think he said he was, an instructor or professor in surgery, and he had been in general surgery, and so forth.

Here you have a man who, on the surface of his testimony, under oath in the deposition, is well qualified. He says he opened up the skull and he says he saw the subdural hemorrhage, and he says he saw the fracture of the skull. And he says he, from what he saw in there, was of the opinion that the man couldn't possibly have lived for more than an hour.

Now, I respectfully suggest to you that he is in the best position to know. And when a witness has the best opportunity he is the most reliable.

That doctor also put something else in, which is

of considerable importance, because you know what a coroner's inquest is. You have heard about them.

A coroner's inquest is had when a death results from accident or when somebody dies in the house without any doctor around, and nobody knows what the cause was and they can't get a doctor's certificate.

But when there is an accidental death, somebody has been killed as the result of injuries, the coroner's part of the deal is this: It is the duty of the coroner to get evidence [704] and investigate for the purpose of giving it to the prosecuting officials, if there is any evidence that negligence on the part of anybody proximately caused or proximately contributed to the death, because you don't have to be guilty of murder in order to be prosecuted. You can be prosecuted for manslaughter, and if you are guilty of ordinary negligence, lack of due care and circumspection, and that kind of negligence on your part results in the death of another human being, you can be sent to San Quentin, because that is manslaughter, and that is a felony. That is the object of the coroner's inquest.

You haven't heard of anybody being convicted of manslaughter. The captain wasn't convicted of manslaughter. He hasn't been prosecuted. So that they want you to say that this captain should have known his man was in this ventilator shaft, where nobody expected him to be.

They should have taken him out. And then what is the evidence about what they would do with him? I don't know whether any of you may have been in

Baltimore or not. Even if you have, you can't decide this case on the basis of what you know. Let's say, for example, that you know, from having been in Baltimore, there was a hospital right next to the dock and that your brother was a neurosurgeon and that you telephoned to him to find out if he was there April 24, 1951, and he said, "Yes, I was there." You couldn't decide this [705] case on that kind of knowledge, because that is something you get out of the courtroom, and it is not evidence.

Now, I have never been to Baltimore, so I don't know, of my own knowledge, what the hospital situation is. If you are a judge, you take the evidence which is offered in the courtroom.

Now, on that basis, where is there any evidence there was even a hospital operating room available for use during any time when an operation might have saved this man's life? Where is there any evidence in here showing the time when he got down into that shaft and struck his head? Where is there any evidence showing how far the nearest ambulance, nearest available ambulance, was at any time immediately after and from the time of the injuries?

Where is there any evidence showing how far the ambulance would have to come to get to the ship? How far it would have to go to get to the hospital and where is there any evidence here showing that there was available at any time, when such service might have done this poor man some good, a neurosurgeon? There just isn't any.

Now, who would be the man most likely to sus-

pect that Mr. Hutchison could have been in the ventilator shaft, if anybody, any reasonable person was supposed to have suspected it and looked into it? The men who were working with him in the morning. They knew what the entire situation was, ladies and [706] gentlemen of the jury. They saw this masthouse, they saw these ladders, they saw these pipe railings. They saw the whole business; they used it.

None of them had the slightest idea there was anything connected with that masthouse that would even suggest the possibility that Mr. Hutchison might be in the bottom of the ventilator shaft.

Now, when those experienced men, who are using the thing, can't see anything wrong with it and can't see anything about it which even suggests that is a possibility and, therefore, they don't look in it, do you think it is justifiable to blame the captain of the vessel as to whom the evidence shows absolutely nothing, excepting that he signed the log on the 25th and the 26th, that Nathanael Hutchison was A.W.O.L.?

The log shows in that respect, also, that—and I think this is of some significance—on the 24th of April, what happened at 1715? “Olive Kupau A. B. reported for duty.”

Now, you will remember Mr. Kalnin testified that they looked in his quarters, they looked in the mess-room. They didn't find him.

Kalnin says, “We just took it for granted he went ashore,” he said, “like sailors do in port.”

So they sent for another sailor. There he is at 1715; 15 minutes past 5:00 on that day. [707]

Now, he didn't come back to the ship until 4:00 o'clock in the morning. I wonder if it is Mr. Simpson's contention that if the man was supposed to be back at midnight—you get shore leave, if you need it; you are not given *carte blanche*.

When he didn't come back until 4:00 o'clock, were they supposed to be looking all over the ship for him at 12:00 o'clock or 8:00 o'clock? Aren't you entitled to rely upon the proposition that, as Mr. Kalnin says, "The ship was in port. A sailor could quit anytime he wants. We just took it for granted that he left."

Now, on that sort of testimony they want you to hold the master of this vessel responsible for not having somebody looking in that particular ventilator shaft. And, in effect, hold the master guilty of this man's death, because if the master was guilty of negligence, in not finding him, or not sending him to the hospital, the master is guilty of crime, so if you find this master negligently brought about this man's death, that is quite a serious indictment.

The corporation didn't kill him. The corporation had nothing to do with it. You act through the master of the vessel; he is the agent.

Now, you have got this doctor situation, and when the doctor said in his testimony he noticed acute dilatation of the heart, why do you think he put that down there for? [708] Keeping in mind the fact that the coroner's inquest, to determine whether there is any criminal responsibility, it is his duty

to find out the cause of death and whether that cause has any criminal connection or anybody can be prosecuted for it. The doctor thought acute dilatation was of importance or he wouldn't have written it down.

Why did he write it down? He didn't say it was the cause of death. If the dilatation of the heart had occurred as Dr. Dickerson wants you to believe, because of some overpumping and so forth, and if the pump had to work so hard that the heart suffered an acute dilatation at the end of this very heavy work, then the acute dilatation would be the cause of death, wouldn't it?

But the doctor didn't say it was. He just put it down. And Dr. Cefalu told you, as I recall,—you know how bad my memory is— I had that lapse this morning about that testimony Mr. Simpson read. But I try to be accurate.

I think Dr. Cefalu said it is within the realm of medical certainty that a living person, suffering from dilatation of the heart which isn't acute yet or even if it is acute, he might have said they could suffer a blackout while alive.

Dr. Lajoie told you the same thing. Dr. Lajoie is French, evidently. He doesn't speak our language as plainly as some others born in this country might, but he is well qualified and there has been no other heart man giving you any testimony. [709]

Dr. Lajoie said there is no connection between subdural hemorrhage and acute dilatation of the heart. And he told you this, which I think should convince you, he said he had watched himself three

or four autopsies here in Los Angeles within the last two weeks in cases involving subdural hemorrhages, and that he was there for the sole purpose of seeing if the condition of the heart had anything to do with the accident or the falls, or whatever it was.

He said in each one of those cases the heart was normal. And, if that were not absolutely true, Dr. Lajoie has stuck his neck right in the noose. He must know it, and he would be on his way to San Quentin in no time, and Dr. Cefalu would be trotted over here and say, "I performed the autopsy on those bodies and the heart was in a state of acute dilatation."

Dr. Dickerson said you get these, that if the heart were forced to overwork and pumped and pumped and pumped and pumped, that dilates it and causes the acute dilatation, which is the overworking of the heart. When it gets to the point where it can't work any more or pump any more, then the man dies.

If that is true, then Dr. Lajoie's testimony is untrue and if Dr. Lajoie's testimony were untrue about the conditions of the heart in cases autopsied in the the coroner's office here, do you think there would have been much delay in having Dr. [710] Cefalu trot right back here to testify in rebuttal?

Dr. Adelstein took the stand here. I want to ask you this question: Suppose your husband, your wife, were unfortunate enough, and let that apply to all of you—wives of the men and the husbands of the ladies—if any one of you had someone near and

dear to you suffer a head injury and there were only two neurosurgeons available to you, in order to try to save the life of that loved one, and those two neurosurgeons were Dr. Dickerson and Dr. Adelstein—and let's say that you knew as much about either of them as you know now and no more and no less—which one would you choose, the man who says he would cut open the skull of your husband or your wife within a half hour, without making these tests that Dr. Adelstein, a careful surgeon, said were necessary, or would you trust your loved one to Dr. Adelstein?

Dr. Adelstein told you, too, that every one of his head cases which dies is autopsied, and he said he had handled subdural hemorrhages. He said that in none of those cases was there any acute dilatation of the heart.

There are other records in addition to Dr. Lajoie's cases. There are Dr. Adelstein's cases and there was Dr. Cefalu over there. He would come on a telephone call with those records, if they disputed that testimony.

Now, I am about finished. I know you are glad. At least, I would be glad if I were in your position. But all I ask you [711] to do is to render a verdict which is the kind of a verdict that any jury should render in any case, from the Latin *verdicto*, to speak the truth, and to speak that truth from the evidence.

My client doesn't want you to cheat this lady, if she is justly entitled to recover damages and if she

has proved her case by preponderance of evidence, give it to her.

On the other hand, my client asks only for equal justice, that is all. My client doesn't want any verdict rendered against the plaintiff by reason of any prejudice against her or by reason of prejudice against seamen or by reason of any emotion. My client wants you to act as you said you would, as sworn judges, impartially.

A Juror: I have a question, if the judge will permit me to ask it. I would like know—I am a little confused, I would like to get straightened out as to the size of the shaft and the height.

Mr. Gallagher: Are you referring to this (indicating)?

The Juror: No, the second—well, that is all right.

Mr. Gallagher: This one (indicating)?

The Juror: No, the one——

Mr. Gallagher: This one (indicating)?

The Juror: No, the other one, the ventilator shaft.

Mr. Gallagher: This (indicating)?

The Juror: I want to know how wide that shaft is and how high is the rail on it. [712]

Mr. Gallagher: That, I think, can be answered. Here is a drawing made by the plaintiff's surveyor, Mr. Haines. Is that the name?

Mr. Simpson: That is correct.

Mr. Gallagher: I am no——

The Court: Mr. Gallagher, you are speaking so

softly I think the reporter is having trouble getting you.

Mr. Gallagher: All right, your Honor. I will try to—I am not, I don't pretend to be a good plan reader, but as I look at this drawing, here is the pipe rail and this would be the stanchion (indicating). It is $40\frac{1}{2}$ inches from top to bottom. That is, from the bottom to the top, $40\frac{1}{2}$ inches.

The first rail, this one here (indicating), is $20\frac{1}{2}$ inches above the floor. This rail is 20 inches above this one (indicating). Is that clear?

The Juror: Yes, I see that.

Mr. Gallagher: Now you want to know the size of the shaft itself?

The Juror: Yes, please.

Mr. Gallagher: Well, the size of the ventilator trunk, according to this drawing, is this: You see this side of it, the one—(indicating)——

The Juror: Yes.

Mr. Gallagher: That is closest to the deck. [713]

The Juror: Yes.

Mr. Gallagher: That is 34 inches from here to the solid wall (indicating). Then this distance from here to here is 30 inches (indicating).

This distance from here to here is $14\frac{1}{2}$ inches (indicating).

And the distance from here to here is $30\frac{1}{2}$ inches (indicating).

The shaft itself *if* not the same shape as the openings up here (indicating). Each shaft is square.

The Juror: It is not square——

Mr. Gallagher: I thought they said it was 36 inches square.

The Juror: It couldn't be, if it is $14\frac{1}{2}$ inches across the back.

Mr. Gallagher: This is the covering on top (indicating). If you look here at this picture you see this—here is the shaft with the ladder (indicating). That picture, that appears to be a square shaft (indicating).

Here is the ventilator shaft, when you get down from the upper part of it, it also appears to be square.

The Juror: Then how would he get $14\frac{1}{2}$ inches across the back, 30 inches this way and $30\frac{1}{2}$ inches this way—(indicating)——

Thank you. I can tell from the drawing. [714]

Mr. Gallagher: If you can follow this. Let's assume that——

The Juror: This is actually the opening in here, then (indicating).

Mr. Gallagher: Yes.

The Juror: This is not open down here (indicating).

Mr. Gallagher: No, not at the top.

The Juror: Not at the top. That is what I mean.

Mr. Gallagher: You can see here — (indicating)——

The Juror: Thank you. I can tell from the drawing. Thank you. Now I understand.

Mr. Gallagher: This is an exhibit in the case.

The Juror: Also, I would like another piece of

information. Will you please again give me the height and weight of the man?

Mr. Gallagher: 66 inches in height; 165 pounds.

A Juror: May I ask a question, your Honor?

The Court: Yes.

The Juror: What clothes was he found in?

Mr. Gallagher: There is no evidence with reference to that in this record. No testimony whatever on that subject that I can recall. And I looked through these exhibits, and there is nothing in any of these exhibits.

A Juror: May I ask a question?

The Court: Yes. [715]

The Juror: How much money was found? Was that record—how much money was found on him?

Mr. Gallagher: Mr. Amundsen was asked one question about that. I think it was the last question. It was, "was there money found on him?"

And Amundsen said, "Yes."

There was no question asked of exactly how much money was found on him.

I will be perfectly willing to let them introduce the receipt they gave to the coroner for the exact amount of money that was found on him, if they want to offer it.

You have got it.

The Court: You are just making argument. The jury have interrupted to ask you a question.

Mr. Gallagher: I can't answer that question, because I don't know. I wasn't there. I am not a witness, but I am perfectly willing to stipulate to reopen the case so you can have proof of exactly

how much money was found on his body and the widow knows it because she got it.

Now, I submit the case to you, ladies and gentlemen of the jury, asking you to, as I know you will, pay attention to the instructions of the court and decide each question of fact submitted to you upon the evidence introduced before you, the direct or indirect evidence, without any speculation.

We can all surmise about how he got in [716] there. I can surmise as well as you can. I could say, but there is no evidence for it, the man was tired. He had been out all night so he waited until everybody went down in the masthouse, so that the mate wouldn't see him and he went in there and he laid down on the floor here (indicating) in the masthouse and he went to sleep. It is six feet long. That deck is six feet long, and it is plenty wide for a man to lie down on, as you will see from the drawing.

So you can see where Mr. Wise is standing here (indicating) and you can see the open door. Obviously, that deck doesn't stop right here (indicating), the drawing.

Do you have another drawing of this, Mr. Simpson?

Mr. Simpson: No, I do not.

Mr. Gallagher: But I am talking about surmise. If I want to speculate, I would say, well, he went in there and he lay down and went to sleep and he rolled in his sleep and he rolled between the middle railing and the floor of the deck and went on down to the bottom.

But there is no evidence to support that. I couldn't prove it. I couldn't point out anything in the record, excepting the fact that he was down in the bottom of the shaft, and that to me wouldn't justify speculating about that.

Or, I could say, if I wanted to speculate, "Well, somebody followed him in there. He had been flashing the money around and somebody followed him in there and hit him on the [717] head."

If I didn't know anything about whether he had some of that money left or not, then I might speculate that somebody injured him trying to rob him and that they got into a fight and that Mr. Hutchison fell down the shaft. But that is pure speculation.

When you get to figuring out how the man got in there, I ask you not to indulge in imagination or or speculation, because how he got in there is important and why he got in there is important, and the mere fact he got in there is of no importance because the mere fact that he lost his life does not entitle the widow to damages.

The mere fact that he may have fallen, the mere fact he did fall, does not entitle her to damages. They have got to prove that the cause of his fall was negligence on the part of the Pacific-Atlantic Steamship Co. in failing, as she claims, to supply sufficient safety appliances in and about the elevator shaft to provide a reasonably safe place to work.

If all you want to know is whether the shaft is big enough for him to have fallen in—and that is going to be the basis of a verdict—then, of course, what I have said is just like throwing uncooked

beans on the ceiling and expecting them to stick there.

But this is not a workman's compensation statute. I think the judge will so tell you. So that the mere fact that an [718] accident happened, in and of itself, is not enough to establish a case for damages. And the mere fact that the unfortunate man is dead is not enough to justify the rendition of a verdict.

Now, I thank you for being patient with me and, as I told you, let's all say, "Halleluiah, I can't argue the case any more."

Mr. Simpson makes his argument. My mouth is stopped. I couldn't say anything even if I had something to say, which I will not be able to do.

Thank you. That is for listening to me. It wasn't your duty to listen to me, so I will thank you. When you deliberate, be careful, be just and be impartial and don't decide any issue of fact because your sympathy for the widow pushes you that way, because that is not in accordance with our Republican form of government or with the system of jury trials which is provided for the protection of your rights, not only to life and liberty, but property.

The Court: It is so near the adjournment hour the court will not call upon Mr. Simpson for his closing today. We will have it tomorrow morning.

Now, there is one thing I might mention to you jurors. I thought of it from time to time through the trial, and then it slipped by. I thought I would mention it in the instructions, but I might forget it. I have it in mind now, so we [719] will just take care of it.

It is not actually instructions, but there has been during this trial quite a bit of publicity in the papers and radio commentators, and the like, about the fact that in a jury room in the United States District Court in some other district a judge permitted a recording device to be concealed; the jury didn't know it was there.

They recorded all of the jurors' deliberations, without the jury knowing it. And as you have noticed from the papers, there is a great deal of furor about that, a lot of discussion pro and con.

There is a lot of discussion pro and con among the judges. One of the other judges here said he thought it was a good idea. He has heard those recordings. He thinks that it was useful in teaching judges to better understand how juries work, so we might be able to develop better techniques in instructing and in the handling of jury trials.

Now, there are other judges who say it is the most outrageous thing they have ever heard of, and I think some Congressmen are going to introduce bills in Congress which, if enacted, would make it absolutely illegal if, in fact, it is not illegal now.

I want to assure you your jury room is not bugged. No recording will be made of anything that takes place in the jury room. No one will be allowed to listen at the door, to [720] see what is going on in there.

It is a very old principle of American law and of English law that deliberations of a jury are absolutely secret. Generally speaking, it is out of bounds for anyone, other than the marshal, the bailiff, to

have charge and see that the jury is comfortable and their wants are supplied, to even be in the vicinity of the jury room.

And while the jurors may talk about the case after the case is over, you can go out and write articles if you want to and publish them in the papers and talk to your neighbors, talk to anyone, but you don't have to. The individual jurors may continue to treat the matter as secret. You can tell what went on there in the jury room or you can just keep quiet about it.

There was a case one time that tested that principle, where a judge was rather disturbed at a verdict that a jury returned and said, "Mr. Foreman, did this jury consider this?" And he referred to a particular bit of evidence in the case.

This was in England, where they are much more formal than we are, and the foreman got up and said, "We have returned our verdict, Milord. We stand on it."

He said, "Answer my question."

He said, "We have returned our verdict. That is our answer."

The judge said, "You can't talk to an English judge like that. [721] You are locked up until you do answer."

The foreman stood by his verdict and refused to answer, and that case went up through all the courts of England, the courts of appeal, until it finally reached the House of Lords, which is the Supreme Court in England, and they decided the foreman of that jury was within his rights, that

no one, not even the judge of the court, can compel a juror to tell what went on in the jury room and what the jury did and what the jury did not consider.

The court may require a verdict, and that verdict might require the answering of particular questions, but that then is the verdict, and you speak through the verdict and no one can compel you to speak otherwise or to enlarge upon whatever form of verdict the court submits to you.

If you have had any feeling upon reading these articles, if you have read them, just forget it, because we are not going to watch what is going on in the jury room.

You are now excused until tomorrow morning. Is 9:30 too early?

At 9:30 we will have the further argument, which will be followed immediately by the instructions to the jury.

And it is then the usual custom to keep the jury here until you arrive at a verdict, so bear that in mind when you park your cars tomorrow. Don't put them someplace where at 4:00 o'clock in the afternoon you would get a ticket, but [722] wouldn't get one up to then. I think there are some such zones here, where you can park for certain periods of time but not others. If you pick a parking lot, be sure it isn't going to be one that will be closed so you won't have access to your car if you don't arrive by a certain hour, because the deliberations of juries are very unpredictable things. They sometimes take a long time and sometimes a very brief

time. Just come prepared to stay until you reach a verdict.

You are now excused until tomorrow morning at 9:30, and do not discuss the case, do not decide it in your own minds until it is finally submitted to you.

A Juror: You mean, Judge, we might be here all weekend? Should we come prepared to stay?

The Court: It is very unlikely you would be here all weekend. Juries ordinarily arrive at a verdict within the course of a few hours.

But tomorrow morning you have an argument from Mr. Simpson, you have the instructions from the judge and then it is the law that after the judge gives the instructions it is the duty of the attorneys to come up here, out of the hearing of the jury, and indicate to the judge any errors they feel he made or indicate any way in which those instructions should be enlarged upon or corrected. And sometimes that takes a little time. But we will send you to lunch, anyway.

We hope you will take whatever time is [723] required to decide the case and not feel pressed, and still be able to get it decided so that you will be free at a reasonably early hour. Generally speaking, juries are, but they sometimes have to stay here in the evening.

Does that answer your question?

The Juror: Yes.

The Court: I might say, just for your information, keeping a jury overnight is a very rare circumstance. I have been a judge of this court now

for practically four years, and I have only had one jury that did not arrive at a verdict on the day that the case was sent to the jury. That was a case that took, I think eight weeks to try. The jury was out two days. But it is very rare that it takes that long, so we hope you have good fortune and are able to arrive at your verdict within a period of time that will not inconvenience you.

Tomorrow morning at 9:30.

(Whereupon, at 4:00 o'clock p.m., Thursday, October 13, 1955, an adjournment was taken to Friday, October 14, 1955, at 9:30 o'clock a.m.)

Friday, October 14, 1955. 9:30 a.m.

Mr. Gallagher: Before Mr. Simpson commences, I have a request to make of the court.

I would like to reopen for the sole purpose of asking Mrs. Hutchison one question with reference to how much money she got from the coroner.

No. 2, I omitted two important elements I would like to state to the jury. I would like ten minutes to do that, as part of my argument. I ask to open because of the question asked by the lady juror with reference to exactly how much money was found on his body.

The Court: The court has closed the case after asking both of you if you had anything further to offer. It is seemingly unorthodox to open now. After having argued three hours yesterday, I don't see how I can properly exercise discretion to allow further argument.

Now, this matter of the amount of money is a short thing. Of course, the amount of money a person receives from the coroner isn't necessarily the amount of money found on the person of the deceased, who has been examined by the coroner. It might come from other sources, and that fact standing alone wouldn't show how much was actually found on the body.

I don't know just how firm the evidence is, if it is at all, on exactly how much was found on the body. [726]

Now, have you discussed this with Mr. Simpson?

Mr. Gallagher: No, your Honor. It is a presumption that nobody stole anything from him. It is a presumption——

The Court: What might have been in his locker, what might have been in possession of the purser and so on. To go into that now is apt to lead us into extensive testimony and possibly even to the taking of depositions.

The motion is denied.

Are you ready to proceed with your argument?

Mr. Simpson: Yes, your Honor.

The Court: If you do find that you gentlemen are in possession of sufficient evidence that you are able to agree on the amount that was found on the body, that is a different thing. But unless there is some unequivocal evidence here about it, I don't think we should go on with it.

The amount of money a widow received from a coroner is not, as an isolated fact, indictative of what was found on the body.

Mr. Gallagher: I am sure we both know exactly how much was found.

The Court: All right. You and Mr. Simpson step into chambers, out of the hearing of the jury, and talk about it. Take any exhibits that you need along. And then return here. If you can agree, all right.

(Whereupon, Messrs. Gallagher and Simpson retired from the courtroom to confer.) [727]

The Court: Now, the court requires a yes or no answer to this question: Have you agreed upon a statement of an amount of money?

Mr. Simpson: No, we have not, your Honor.

The Court: All right. Then proceed with the argument.

All proceedings have been had in the presence of the jury, except the conference of the attorneys out in the hall.

The request was made as soon as the judge entered the room and before I had made the finding that the jury were present.

Mr. Simpson.

Mr. Simpson: Thank you, your Honor.

Mr. Gallagher, ladies and gentlemen of the jury, after yesterday's incident respecting my reading of the record, I did not believe there would be any further imputation of improper procedure on my part. I didn't believe that Mr. Gallagher, for example, was going to go so far as to suggest I was trying to hypnotize you, as he indicated, that I was trying to lead you by the hand or that I was

indulging in some kind of sophistry to get you to believe things that just, in fact, are not true.

But it seems to me that by going into such personal elements and trying to pursue those, we are losing sight of actually what is involved in the particular case.

Mr. Gallagher spoke to you at some length regarding a [728] number of issues, and in those he raised some which I don't believe at this time we need necessarily go into; items which are definitely extraneous and not relevant to the particular issues before you.

I think I would insult your intelligence if I tried to answer such question as, can you reasonably expect me to ask, does the City of Baltimore, one of the oldest cities in America, have adequate hospital facilities or are we accusing this corporation of killing this particular man.

Our position has been that the corporation, the Pacific-Atlantic, was responsible in that they violated their statutory duty of providing a reasonably safe place for this man to work. Let's go into the things that really count, the things Mr. Gallagher has brought up, and take them up one by one and see what conclusion we can draw. So we won't keep you too long, I will try to speak a little faster.

The Court: You take whatever time you need for your argument.

Mr. Simpson: Thank you, your Honor. The first thing Mr. Gallagher particularly endeavored to emphasize yesterday was that the plaintiff had raised a theory as to how this happened at 11:00 o'clock,

how the plaintiff is asking you to return and say, "We have found this is how the particular death occurred."

Now, I ask this question of you: What would you say if [729] I were, perhaps because of indignation over some of the things Mr. Gallagher has said about me, to go out and hire somebody to murder Mr. Gallagher?

Don't misunderstand me. What I am actually getting at is this: That if you had evidence, if you were a jury and had evidence before you, one, that Mr. Gallagher was found dead, and, two, evidence that I had actually hired somebody to murder him, it would be quite unimportant as to how he was murdered.

In other words, the responsibility, the liability that the law would impose upon me would be there because I was the cause.

Our position in this particular case has been, one, that Nathanael Patrick Hutchison was found dead.

Two, that the Pacific-Atlantic Steamship Co., his employer, did not provide adequate safety appliances in order to provide him with a reasonably safe place in which to work, and that for that reason their violation was the proximate cause of his death.

It doesn't make an awful lot of difference how this happened. We endeavored to give you the evidence yesterday as to precisely what the development was. It is immaterial how it happened, whether it happened at 11:00 o'clock, or whether or not it might have happened later on.

What we tried to suggest, frankly, was what we considered [730] to be, in our opinion, the most plausible way, but you, as a jury, are not obligated to find out exactly how it happened. In fact, the evidence, as we pointed out, is very silent on that, because nobody saw this happen. So you would have to actually infer from the evidence—it is the only way you can do it—there were no eyewitnesses to this.

Now, in this particular case Mr. Gallagher said, “Well, let’s bear in mind the fact you brought in a witness by the name of Kalnin, the boatswain, and you tried to indicate he was confused, and then he proceeded to tell you, “Remember, Mr. Simpson vouches for the veracity of this man. Here he is coming in and attacking him.”

Ladies and gentlemen of the jury, that is not true. What I suggested to you was not that Mr. Kalnin was lying in any way whatsoever. I don’t believe he was lying. I believe, to the best of his memory, he was telling what he thought happened.

I suggested to you, in light of the evidence, there was possibility of confusion on the part of Mr. Kalnin. And that is the only thing we have brought out. In other words, I wish to make one thing very clear: That we are not taking the position that this did happen at 11:00 a.m. or 11:30 a.m. or 12:30 or 2:00 o’clock in the afternoon. We don’t know, excepting that we do believe from the evidence you can make certain reasonable inferences. But to pursue that point is [731] to beg the question.

It is immaterial what hour it happened. The im-

portant thing in this particular case is the question, was this man provided with a reasonably safe place in which to work. If, because of a failure to provide that, this man experiences injuries and dies from those injuries, then the Pacific-Atlantic Steamship Co. is liable.

Now, Mr. Gallagher next went to the question of saying, "The plaintiff, remember, has the burden of proof and the court will tell you that." And that is true, and that is what we have endeavored to bring forth here.

In that regard, what did he point out to you? What was the particular thing that he emphasized? You remember he emphasized almost three years ago, he put me on the stand to bring this out, that almost three years ago he supplied my office with a complete list of all of the members of the crew and their addresses.

He said, "What has Mr. Simpson done? He has actually brought in the boatswain, who was in charge of the crew, and the testimony of Amundsen. He has brought in two of all these members of the crew. Why hasn't he brought in more? Is that carrying the burden of proof? Is that proving the case," Mr. Gallagher asks.

Ladies and gentlemen, let me take it a step further and point out why. We brought evidence from these two people who [732] were involved at the time. Now, bear in mind this is the important question: With all these other people who were employees of the defendant, if any one of them would have said one word which was contrary to the two

we have brought to you, can you help but believe they would have had that one person, if they could have found just one, who would have said something different? They would have had that one person on the witness stand here to tell you that this just wasn't true.

But, of course, there isn't even one witness from the defendant, from the captain of the ship right on down, that has come in here to tell you what these two witnesses, who were involved at the time, told you was false.

Consequently, we can only say in this connection, certainly, the plaintiff has carried her burden of proof, she has presented evidence. The evidence has not been rebutted in any way whatsoever, and there has been no attempt manifested here in this courtroom by the defendant to rebut that.

Then Mr. Gallagher moved to another type of argument. He said, "Let me point out to you this particular ship, the Linfield Victory, remember, was owned by us. You own part of it, Mrs. Hutchison owns part of it, all of us own it. Consequently, we should perhaps indict the United States of America if there is some type of liability here."

That type of argument is, I submit, absurd, because it is like reasoning that some one of you happened to be a friend [733] of President Eisenhower and you go to call on him because he is ill. You visit with him, and you are staying around there for a little while. He suggests maybe you want to use his car because you came in by plane. You get into the car and you drive, and you drive

negligently and you have an accident. So you say, "Well, after all, the person who was injured because of my negligence, I was negligent, that is true, but they can't sue me. They can't claim I did anything wrong, because I don't own this car." You say, "You see, this is the President's car. It is owned by all the people."

Who was actually operating this on April 24, 1951? It was not the United States Government that was operating this. The evidence shows that it was the Pacific-Atlantic Steamship Co. that was operating it. The United States Government had actually conducted the financing, built the ship, owned it during the war for the purpose of meeting the emergency we were confronted with at that time, but it was the Pacific-Atlantic Steamship Co. that was operating that ship.

What did Captain Dyer say with respect to the ship in August of last year? He said he was aboard and the agents at the present time are the Pacific-Atlantic Steamship Co. We can only conclude, to come up here and tell you you can't impose liability because this is owned by the United States Government is a specious argument that I am sure your common sense will reject. [734]

The next argument was made, in connection with the particular ship, that, "The Government hasn't seen fit to make any particular changes here and for that reason we concede it must be safe."

Again this argument must be rejected. I submit that the Congress has seen fit—and this is getting into what you call the people—our legislative repre-

representatives in the Congress passed a law known as the Merchant Marine Act, commonly known as the Jones Act, the one we are in here under today, saying that all of these operators of ships must provide a reasonably safe place for their employees to work.

Our contention has been that they have not done this, so why do we have to pass additional legislation, why do they have to go out and go something when it is not a problem of new legislation needed here, but it is a problem of compliance with the law. Every time a murder is committed out here, you don't race out and pass a law against murder. You say, "Let's enforce the one we have."

We are here today. There has been a violation of the Jones Act, in that the employer hasn't provided a safe place for this man to work in.

Mr. Gallagher says, "Let's recognize the ship was inspected; in fact, paid experts, men who went on there. In fact, they were on there for a couple of hours."

Commander Sayer, the log will show that investigating [735] this in a couple of hours, "What kind of an investigation are you going to have more specifically?"

He said, "Remember, the important thing is that we have a certificate of inspection."

I would like to say a word or two about that. He showed that to you. He emphasized this was important because it showed how this ship was fit.

Ladies and gentlemen of the jury, I submit and ask you to examine carefully the certificate of in-

spection. That it in no way establishes that this was a safe place to work. And I want you to look at it quite carefully and you will see it is a general inspection. It does not have one word—and you look at it—it doesn't have one word on its face about this particular area at all.

Now, when you look you will see a list of the particular things that were inspected.

In fact, may I have that particular exhibit?

Thank you.

This certificate of inspection, which you remember Captain Crawford said is on all American ships, they can't even go to sea unless they have this certificate of inspection, and if this certificate of inspection meant that the ship was safe, there could be no violation, there would be no point in the Jones Act even, because that would mean you just couldn't have an unsafe place on any ship. You couldn't have an [736] insufficiency in appliances, because all the ships have to have this to even get out on the water; that is a general type.

Here it tells what they actually have. Mr. Gallagher read that. That is, it is constructed of steel and things of that nature. And then it goes on down and says: "The Following Particulars of Inspection Are Enumerated," and a general inspection followed by a particular inspection.

And I want to read to you this list, and if you can find any place on there where it mentions anything about a ventilator shaft or anything about illumination in that area, or anything about the

screens and safety, then you are reading something that I cannot find.

In other words, ladies and gentlemen, this reminds me very much of a particular instance I heard of once, where a doctor was called upon to examine an individual and he completed his examination, and the person who had sent the patient down there said, "Well, Doctor, how is he?"

And he said, "Fine. Fine. I couldn't find anything wrong with him."

He said, "What about the particular irritation on the skin there? Didn't he mention something to you about that?"

He said, "No, he didn't mention it to me particularly."

He said, "Well, that was the main thing I was concerned about. I should have mentioned that to you."

So another examination was conducted and they learned [737] this man had leprosy.

Now, the thing I am endeavoring to illustrate is when you have a general examination, which is designed for the particular purpose, you frequently get a result which is true in general, but when applied to the particular it is not. And that is the case with this particular certificate of inspection. There is not a thing, when you look at the particulars here, which are enumerated, that even mentions this particular area, and, therefore, I do not believe you should permit yourselves to be misled by such evidence, because if it were true you just couldn't

have a ship on the high seas that could have any unsafe place.

Well then, Mr. Gallagher went further and said, "I want to ask you this question: Would a reasonable person before this happened have anticipated that a person might fall into the ventilator shaft? Would a reasonable person might have anticipated this might have happened?"

The answer is an unequivocal yes, when you have an opening which goes down 20 feet 6 inches in depth, and it is on an area where people are walking—a small area, I might say—small in the sense that the total diameter is just a little more than six feet. You can take a step—Mr. Gallagher walked across this courtroom and measured off the courtroom. Every time he took a step he computed three feet. Two steps and you walk into the ventilator shaft. It is a small distance. [738] If a man makes a misstep, he is down in that ventilator shaft, unless he perchance is saved by the particular guard rails pointed to. They wouldn't have put the guard rails there if it hadn't been anticipated.

It is apparent to anybody looking in a place going down that deep if you anticipated it it does constitute a danger. The question here is if enough, if reasonable steps were taken, if you will, to render this place safe so that people like Nathanael Patrick Hutchison, working aboard this ship, would not be exposed to unnecessary risks and hazards.

The next question Mr. Gallagher put to us in argument was this: Was the Pacific-Atlantic Steam-

ship Co.—this was on the question of conducting a search—he said, “Were they expected, when Hutchison didn’t get back until 4:00 a.m., because he was late, to start commencing the search?”

The answer to that question is very simple. If 4:00 a.m. had been a time designated that he was to meet there, to be aboard the ship, which there is no evidence in the record to show it was, then definitely if he did not appear they should have endeavored to ascertain where he was. He was supposed to report at 1:00 o’clock for work. He didn’t report, and Amundsen said, “I wonder where Scotty is.”

And the boatswain said, remember, “I will go up and take a look at the forecastle,” which he did, because that is where his living quarters were.

The man had been tired. He wanted to see if possibly he had gone up there to go to sleep, or something.

The answer is yes, economics would tell you to look, because you don’t want to be paying a man you actually haven’t got working for you.

And, secondly, human concern for the safety and welfare of these people would make it mandatory that a search be conducted, plus the fact that Captain Crawford testified it is customary, when a seaman is missing, to commence a search for that particular seaman.

There are some other items Mr. Gallagher brought up that I think are rather significant, too. For example, he emphasized this point of sobriety. This distressed me considerably, because, as

he talked to you, he kept emphasizing this point, "Ladies and gentlemen of the jury, you are to decide this case upon the evidence." He kept insisting that is what you are to decide upon. That is correct.

And then he argued to you regarding a conclusion which is not founded upon the evidence. What evidence is there in this record to the effect this man was not sober? There is one word. It stands out. It has been repeated time and time again. The boatswain said, "When I woke him up that morning to get him to go to work, he was feeling rough and he appeared to have a hangover."

Now, the boatswain was asked, "Was he sober?"

And his answer was an unequivocal "Yes, he was sober."

Amundsen was asked—and Amundsen worked with him, that man was down there working for a few hours, remember,—"Was he sober?"

And Amundsen said, "Yes, he was sober."

Now, Mr. Gallagher in his argument, the course he has pursued here, would have you believe this man was not sober; there was something wrong here.

I submit if we for one second believed this man actually was not sober, the argument that we would have pressed with the greatest force in this case was the fact it was a type of criminal negligence to order a man who was drinking to go down into an unsafe area like this. If a man comes out and he is drunk or he is not sober and this boatswain wakes him up and finds he is not, and tells him to

go down into this dark area, climb into this shaft, that in itself would be the worst kind of negligence.

No, they considered him competent to go to work. They know he worked down there. The evidence is undisputed regarding the fact he did work down there, certainly, until coffee time, and then he went back down again and came up, and then we run into some conflict.

Let's go a step further, though. Mr. Gallagher emphasized, "You will hear about this presumption, but don't overlook these other things." The presumption that because this man [741] is dead, that he is presumed to have exercised due care for his own safety.

Now, that is a presumption, a legal presumption, just like you presume a man is innocent until proved guilty, and in the absence of evidence to the contrary showing he was not, you must go by that. There is no evidence in this record in support of that particular position. Now, really what is happening here, I submit, is something like the type of thing that might occur in any one of our homes. It might be that in my home, let's say, that the linoleum in the kitchen is torn up just a little bit, turns up at one side.

And my wife walks into the living room one night and sees me stretched out on the couch there watching television, reading a paper or something, and she says, "I wish you would fix that linoleum before somebody falls on it."

So I tell her that I will. And, well, typical of

my promises along that line, which are always beset with good intentions, a month later the linoleum is still torn up there. One night one of my little girls is returning from the dining room and she has a whole armload of dishes. As she walks into the kitchen we hear this awful crash.

What would you think of me if I raced out there and bawled her out and said, "Look, you knew that was there. You were clumsy. That is your fault."

And you would turn to me and say, "Mr. Simpson, that is [742] your fault. You should have made that safe. You should have repaired that. Don't blame her."

The defendant in this case is taking the position that, "After all, this man was aboard the ship and he certainly could have avoided falling into this. Don't blame us just because there was a hole there we didn't cover up, we didn't put a screen on, like we had the starboard side of this ship. Don't blame us because he fell in." That is not plausible.

The fault must be placed in this instance on the *Linfield Victory*. They should have anticipated—a reasonable person would have anticipated—on their own ship. I repeat in their ventilator shaft they had three screens, and Amundsen told us they had a screen on other *Victory* ships. He had been covering this particular area.

Mr. Gallagher objected when I started to read that. You recall that is what he said the important thing is, they did have screens on other ships covering that, so a man wouldn't get in there, and very little more has been said respecting that particular

argument, so I submit to you on this question of whether this man was exercising due care, we can only draw the conclusion, we have the legal presumption he was exercising due care and there is no evidence in this record to show anything to the contrary.

Another question brought up by Mr. Gallagher pertained to the question of employment. "Where is the evidence," Mr. [743] Gallagher says, "as to the exact time of this fall?"

Well, if he means the exact hour, the answer is simple; we don't know. There is nothing in the record and we are not contending it happened at 11:05, 11:10 or whatever it might be.

He is contending as to what day; we believe the evidence is sufficient. Since he was missed at 1:00 o'clock, the men did not know he was there on April 24th, that certainly this did occur on April 24th.

Well, does that prove he was in the employ of the particular steamship company? It seems to me that common sense again compels us to reach the conclusion he was employed by them. Is there any evidence in the record to show he ever left this particular ship? Are we to believe he went off and came back and jumped into the ventilator shaft, or what? Why would he get into there?

We know he used the particular shaft to go down into the hold. Mr. Gallagher says, "Now, just a minute. Just a minute, now. As far as the working area, the only evidence we have in this record respecting work is the fact that down below in the

hold these men were gathering things together, dirt and what not, to put in slings to be hauled out. But we have no evidence of the fact in the record that this man was in a work area, when we went through this particular masthouse."

Well, that is an absurd argument, I submit, for one [744] obvious reason, the boatswain told us that he told these men to go down there. That means men went down there. That they were aboard this ship. They were going down there for the performance of a duty ordered by this boatswain. And to try to say that they are not working until they get down there in the particular area and are picking up dirt is certainly an argument that Mr. Gallagher even knows isn't one that can be supported.

Actually, the point involved here is that a seaman has an unusual relationship. He is aboard this ship and he has his home as well as his factory there. It is something that doesn't happen in most cases.

But while he is aboard that ship he is subject to call for work there, while he is aboard that ship, whether he is eating lunch or whatever it might be. He is their employee. He is there for their benefit as well as his.

And, therefore, I do not believe that we need pursue that matter any further, because it is quite clear that we do have a situation where this man was employed, and there is not a scintilla of evidence in the record to show he did leave that ship. In fact, when he was found dead it was aboard the ship; not ashore.

Now, Mr. Gallagher, on the question of a safe

place, said, "Let's now be realistic about that. Let's recognize, with respect to the illumination aboard this ship, that we have [745] failed to have any presentation of evidence whatsoever that the lighting conditions aboard this ship were of such and such a quality on April 24th."

He said, "We haven't had one person take that witness stand——"

Mr. Gallagher: Just a minute, your Honor please. I assign that statement of counsel as incorrect. I assume it is an inadvertence. I didn't say "light". I said "visibility, condition of visibility, degree of visibility."

Mr. Simpson: I stand correct then. "Degree of visibility" on April 24th. I ask you, we have had testimony regarding the condition of visibility and I ask you what changes, if any, have been brought out by that testimony. Is there any reason to infer that changes have been made, that they had perhaps some type of permanent fixture in there on the 24th or something, and that it had been removed or something, by way of a special light that was in there that isn't there now or wasn't there when the others went aboard?

Fortunately, on this particular item, since we have witnesses telling you how it is dark and we have witnesses telling you how they can see so much, as I said yesterday, it is quite fortunate you have the pictures. You can look at them. Disregard what the witnesses have said, if you find you can't believe that, and look at the pictures and see, and the one thing that I feel you can't help but

admit is that [746] inside that masthouse it was not because of diffusion of light or what have you, as light as it would be outside, but somehow or another there was an adjustment so it becomes a question of degree. Look at the pictures and decide for yourself what that degree would be.

On this point Mr. Gallagher raised something quite interesting. He said, "Suppose that one of you get onto a bus and it is broad daylight and you have got a lot of light and you are walking down the aisle and you, of course, don't see the banana peel there. You step on it and there you go."

So you go to Mr. Simpson and he comes in here and says, "Let's sue the bus company because there was insufficient light."

Now, I think the interesting thing about his particular analogy, since in the case he gave there is no indication there was insufficient light, the interesting thing about his analogy is this: suppose there had been a hole in the bottom of that bus floor, and suppose that hole was the same size as the opening in that ventilator shaft and when you had gone down, remember the iron rails—make them the same distance as the iron rails here—and when you slipped on this banana peel or because of the jarring of the bus, or whatever it is, you went into that hole and you dropped on the cement below.

Then our position would be that this bus, if that hole had to be there, certainly, had not provided adequate safety [747] appliances for the protection of the passengers on that bus.

In this particular case, we don't know what hap-

pened. But we do know that he went down there. We do know he was found there. We do know that if they had done on this particular ship the same thing that had been done on other ships, and even the same thing, if they had done on this ship, fix the port side like the starboard side and actually have gone over and enclosed this, just like this one was enclosed (indicating), this wouldn't have happened. Or cover this with a screen as Amundsen told us.

That is the important thing about the particular illustration he has brought out. He went a step further. He said, "There is no evidence in this record to show the door was closed."

There is no argument about that. It is again something we have to infer. When you are concerned with the degree of visibility and the illumination, look at the pictures. Remember that John Hutchison said when you stepped in there, with the door open, even then, because it was like coming from a bright area into a darker one, you had to wait until your eyes became adjusted and then you can see around.

So this point of illumination, since it is the custom, as Captain Crawford said, to provide adequate illumination in the areas where the members of the crew are working, I might say to that point just parenthetically, here was a [748] man of experience who knew what we were concerned with here, and it never seemed to occur to him in his testimony, when he spoke of this custom and all that, this

necessarily was something that was not part of the employment of a man, or the area.

Well, the thing I am trying to bring out is that basically we are begging the question if we start going into whether it was real dark, real light or whatever it might be.

The primary question is this: Was this place a safe place to work? Did this employer do what was reasonably necessary to make it safe?

And our contention has been that with the custom to provide light, they should have provided adequate illumination. Even if you found they provided adequate illumination, we have to bear in mind the fact the screens were there.

Wasn't that a simple thing to do, a very simple thing, and not a new or novel device? Something they were familiar with. For that reason we submit that that particular attack or defense by Mr. Gallagher cannot stand.

The next thing he went to was this question of conscious pain and suffering. He said, "Now, after all, we have Dr. Glauser who performed the autopsy on this man. Wasn't he in the best position to determine whether or not this man could have experienced any conscious pain and suffering?"

Well, I submit this, ladies and gentlemen: I am not a [749] medical expert, as I am sure you know. We had three doctors on the stand here. We had Dr. Cefalu, who said, "In my opinion he experienced conscious pain and suffering, or he probably did."

Then we had Dr. Dickerson, who said he prob-

ably did, and then we had the defendant's doctor, Dr. Adelstein, who said in 40 per cent of the cases they do, in his opinion.

So I leave that to you. We are not going to press the matter. As I told you in opening argument, if you feel that he didn't experience any conscious pain and suffering, you can't give us anything and we don't ask you to. It is our conviction that the probability is that he did experience conscious pain and suffering.

Now, next Mr. Gallagher went to this point of acute dilatation of the heart. He didn't say a great deal respecting this, other than emphasize one particular principle, and that is these doctors all seem to agree on the idea that if you have acute dilatation of the heart you can black out.

Now, with that he somewhat passed on. But I think we must explore that just a little, because the important thing is not that they could black out—that is true—the important thing to be considered is that a man with acute dilatation of the heart occurring, if he were at the top of this particular shaft, would not have a subdural hemorrhage following it. [750]

I tried to explain that yesterday. You remember I read from the portion of the record that I had had the reporter type up. Dr. Dickerson was asked this question: "Can there be a subdural hemorrhage if the heart stops beating?"

His answer was:

"No. When the heart stops beating all circulation in the body ceases instantly. If there is an open or

torn vessel, the bleeding stops immediately. When the heart stops working, the circulation stops, because it is a pump forcing the blood around. When the pump stops, everything stops."

Now, remember I explained the significance, at least to me, of this. It is not a medical analysis at all, but that if you have got the pump and it is pumping this blood out in the normal course, how do you get a subdural hemorrhage? Well, something is broken. There is a leak over here, because you get a blow or something of that nature and you have torn or damaged veins or arteries.

When it springs a leak, how do you get the subdural hemorrhage? The blood that leaks out, remember, as all the doctors seem to be in accord, builds up into a clot and as that clot gets larger and larger it creates a pressure which causes death.

If you have acute dilatation and the heart stops, and then the man tumbles inside, there is no pump working and he [751] is at the bottom there. He would not have a subdural hemorrhage. That is the crux of the medical testimony. That is the key in this.

I don't know what the defense has attempted to do. They speak of how we are trying to lead you by the hand. Yet they would suggest fantasy, they suggest how it happened, they have given you a theory.

We have given you what we consider a more plausible one. I repeat it is immaterial whether it happened in the morning or in the afternoon. The important thing is that it happened and it happened

because of the failure by the Pacific-Atlantic Steamship Co.

Now, Mr. Gallagher said, "Well now, really, this will be resolved best if you just stop and think of the two doctors and you ask the question, of Dr. Adelstein or Dr. Dickerson, two neurosurgeons, which one, if you had a loved one," he said, "would you want to perform that operation, the man that is going to get in there in a half hour and perform or the man that is going to conduct thorough examination." That, I submit, is an attempt to mislead you.

I am sure you will recall from the examination Dr. Dickerson said, "Yes, these examinations should be conducted. I conduct as much as I can. If I am confronted with an emergency situation, the man may be dead in an hour, I am not going to sit around for three hours while examinations [752] are conducted and say we didn't have enough time to examine him."

He said, "I am going to be in there in a half hour. We can take the X-ray in the room. In other words, make an analysis. But the primary thing is to try to save the life."

I am sure that is what you would want with your loved ones. I certainly would, confronted with an emergency situation.

As a last item, one taken up first by Mr. Gallagher, he said he wasn't going to say anything about damages, and then he did say something about them. You remember the thing he said about damages was that if you look at the figure that the

plaintiff had put up here and see what she is asking, he said, "I ask you to ask yourself this question, when you consider that figure, if that sum of money, this particular amount, the \$3,529.00 each year, if that were invested and it drew interest and it was a good investment, think of the 19 years of her life expectancy, what that would amount to and how much money you are giving her.

I ask you to think just a little further than that, because I am sure you would, anyway. I ask you to recognize that, first of all, that would assume that this money, her pecuniary, the money she has no longer for support and maintenance was not going to be used for support and maintenance, she has it free and clear to take down and put in an [753] investment, that just isn't true.

Secondly, it completely overlooks the fact of inflation. Now, we have a 19-year period here. Consider during the past 19 years what has happened to the dollar, and recognizing from that, that if you project it 19 years, is the sum greater or is it less? We might, of course, have a change in the economic cycle. I am not standing before you as a prophet on that at all. I am suggesting it would be unrealistic for you to say this sum must be reduced just because she could invest and making judicious investments come up with the amount of money that would be equivalent of that.

In other words, the thing we have tried to emphasize throughout this trial is that there was a legal duty and that it was not complied with by this defendant. That we were not asking them to do

anything that was unusual, that was extreme. We were asking them to do a very simple thing, to simply make this particular place *save* for the employees who would work in there.

Had they done the things we have suggested, had they put a screen in there, which they have been very silent on, this man could not have been down in the bottom of that shaft. Had they had it as they have it on the starboard side this could not have happened. Had they had illumination, adequate visibility it might not have happened.

When it happened, that is not your question. We will [754] concede maybe it happened in the afternoon; we don't know. You don't have to return with any feeling or verdict regarding that.

You do have to find, first, was a safe place, reasonably safe place provided for this man? Did this employer act as a reasonable person in providing sufficient safety appliances? Was his death, in other words, and were his injuries a result of the failure to do what a reasonable and prudent person would do? Then you must bring back, if you find that, a verdict for the plaintiff.

So far as the sum is concerned, we have suggested what we consider to be a fair and equitable sum. You must be the judges of that and determine to what she would be entitled in this particular case.

The important thing I wish to emphasize is that this is her only day in court. If you make a mistake she doesn't come back here and try to say, "Well, let's do it all over again." This is the time when you

judge, you be serious, you have taken your oath; I know you have meant it.

I only ask you to remember those words of the Persian poet, when you make up your verdict, when you reduce it to writing, that,

“The moving finger writes; and, having writ,

Moves on: nor all your piety nor wit

Shall lure it back to cancel half a line,

Nor all your tears wash out a word of it.”

Friday, October 14, 1955

The Court: Let the record show the jury and alternate present and litigants represented.

Now, members of the jury, we come to the instruction part of this case. If I don't speak out with sufficient force that all of you hear me, just hold up your hand and I will try to put a little more voice into it.

You have heard arguments yesterday and today, but they were arguments which you are to consider, of course. Your judgment, that is, your verdict will be based upon the evidence. And what you are going to hear now is not argument, but it is instruction.

As each of the attorneys have told you, you are the exclusive judges of the fact. That means that so far as your decision upon the facts is concerned, which is all that is going to be submitted to you to decide, your judgment is final, and no one can inquire into it.

Oh, they might come around privately and ask you questions after it is all over, which you may an-

swer or you may just tell them to go away, as you desire. But no one officially has any power or ability to set aside your decision as to the facts in the case.

If, on the other hand, in what I tell you now I make [756] a mistake of substance the Court of Appeals, which has jurisdiction over this court, can set aside the whole proceedings and order us to start again, because of my error.

The reason for that being that I am a lawyer and what I tell you comes from the law books or from my reasonable application of the principles in the law books to the law of this case. And that is a legal matter and the Court of Appeals, in looking at what I say, has access to the same books to which I have access, and they can check up on me.

But you have heard the witnesses, and a Court of Appeals, on looking at a judgment in this case, doesn't have the witnesses before it. It has only the cold record. You are in a different position, having heard the presentation of the case here, than someone reading about it at a remote time in the future.

Hence, you must accept what I tell you by way of instruction. And the litigants and the judge must accept what you return here as the verdict as to the facts.

Now, counsel, in view of the fact that I have rejected so very many proposed instructions, and it was your duty to offer proposed instructions in order to tailor my thinking or direct it into the proper channels, but since I have rejected so many and have formulated my own charge, largely from

books, where it is being either directly or substantially quoted from a standard book, I will tell you what it is from [757] as I go along. I think it will be easier for you in stating your exceptions to the charge if I do that.

For instance, I am going to use California Jury Instructions Civil, which we commonly call B.A.J.I. I will simply say, "B.A.J.I. so and so" when I come to a number.

That, members of the jury, was for the attorneys. If I occasionally say, "B.A.J.I. number so and so" I am talking to them, because they have a privilege and, under some circumstances, a duty to take exception if they have any to whatever I say and to point out related things which I should also treat. So I am simply trying to indicate to them what my source material is, because they have it available to them, too, and it might suggest to them things which they should suggest to me.

Now, at the outset, the mere fact—and "mere" means only—the pure, simply fact that the man Hutchison died, in what has been termed here an accident, isn't enough for recovery, that is, recovery of damages here.

We have in some branches of industrial life what is known as workmen's compensation. That is a system by which persons who are injured or die in the course of their employment automatically set in force the return from the employer of certain benefits.

If they are dead their families get those benefits. [758] But that is something that just arises from

the relationship of employer and employee, and the fact of injury. This is not such a case.

That law does not apply to ships at sea, and if there is to be a recovery here it must be upon particular principles of law and because the defendant has breached some one or more of its duties, and that breach has been the proximate cause of the injury.

Now, these instructions necessarily take some time. I will undertake to go slowly. If, when you get into the jury room, you find that you are in disagreement as to what they are and it is a matter of importance to you to know again, you may come back and have an instruction repeated or enlarged upon. It is well for juries to try to rely upon their memory, but if you need further instruction the courtroom is open to you and the judge available to give it.

Likewise, if you find yourselves in dispute as to what certain evidence was, that is, what witnesses testified to, you may come back and have it read. But bear in mind that it takes about as long to have it read as it took to have it given in the first place, and it takes a little time for the reporter to look it up. Hence, you don't lightly come back here to have evidence read. But you come back if it is necessary for the proper pursuit of your consideration of the case. [759]

When you retire to the jury room you will elect one of your number as foreman, or forelady. The last jury I had it was a forelady. And that person presides over the deliberations. And it is a duty of

the foreman or forelady to see that every member of the jury has an opportunity to express what is in his or her mind and that each one gets to make their individual contribution to the discussion, and that the case is fully discussed and considered.

Then you come to the voting upon a verdict. And a verdict is the combined judgment of all twelve, becoming one judgment. It means that all twelve of you agree, all twelve of you are of one mind. Your verdict must be unanimous.

Now, it is the duty of the jurors to consult with one another, and each of you should bear in mind that every other one of you has been accepted here on the theory that you were as bright or practically so as every other one. At least, that you have comparable and approximately equal abilities here as persons of impartiality and persons who are going to give the case full and fair consideration.

Hence, you should listen to each other and no one should surrender an honest conviction, which you have and from which you cannot depart without violence to your own honest conscience. But if you can come into agreement, you certainly should do so because these cases should be brought to an end and not be tried over, and we should, if possible, [760] without any juror surrendering an honest conviction, have a verdict. And bear in mind again that any such verdict which you return must be unanimous.

There has been some talk here about speculation. Speculation simply means intuition or guessing.

There has been a lot of talk about an inference,

and a dictionary definition of inference, which I looked up,—Webster's Third International—is "The acceptance of a proposition as true from another which has been proved to be true."

Now, instructions of a judge to a jury are to be taken as a whole, that is, you don't go out and just single out one particular instruction and hang your case, or your decision upon that single instruction. You go to the jury room and you consider the instructions as a whole and view the evidence, which has been presented here, in the light of that total instruction.

If there is legal liability here, that is, if Mrs. Hutchison should recover, the fact that the United States has or had an interest in the vessel, the Linfield Victory, does not affect the responsibility.

This suit is not against the United States. This suit is against the operators of the Linfield Victory, who have leased the boat from the United States, and if there is liability they are liable. [761]

However, although it used to be that you couldn't sue the United States, for some time now it has been the law that the United States has just the same liability in cases where it does wrong as any other operator of an enterprise or property. But the fact that the boat was United States property does not detract from liability, if you find liability to exist.

Now, throughout the instructions I will have to give you rules of law which, to some persons, might seem to indicate that the judge feels one way or another about the case. You should bear in mind you

are the sole judges of the facts, and that it is the duty of the judge to fully instruct upon all legal issues, which might be considered by you, which might properly bear upon the decision.

Hence, in the course of the instructions I will talk about damages, but that doesn't mean that I am instructing you to give any, nor does this comment that I say it doesn't, mean I am instructing you to give any an indication that I think you shouldn't. I am just undertaking to give you the rules, and you apply them, without taking any cue from me as to whether or not the plaintiff should recover.

Because many of these instructions, having been given over and over in many cases, have been edited and compiled in books and the language smoothed out by scholars and editors, I am going to read many of them, but I have given some just out of my head so far and I will give others [762] extemporaneously, and I might read some from papers. It doesn't make any difference, they are all instructions and each are to be treated equally.

I am now reading B.A.J.I. 21:

"In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the 'burden of proof' as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more con-

vincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

21-B B.A.J.I.:

"While it is incumbent upon one who asserts [763] the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainties; because such proof is rarely possible.

"In a civil action such as the one we now are trying, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring that party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party."

B.A.J.I. 22:

"Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact, which, though true, does not of itself conclusively

establish the fact in [764] issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

“A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive,——” and we don’t have any in this case of that kind “——it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

“An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts ‘as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.’ ”

22-B:

“Whenever in these instructions I refer to a presumption, I mean one that may be rebutted. The fact that such a presumption arises must never be taken to mean any change in the rule of burden of proof. To explain this point more fully: A [765] party against whom such a presumption is directed, if he intends to deny it, must, of course, present evidence to the contrary, but if the burden of proof on the issue to which the presumption relates does not rest on him, it is not necessary for him to overcome the presumption by a preponderance of the evidence. In that case, with the burden of proof

resting on the party in whose favor the presumption is invoked, the presumption, together with any other evidence supporting it, to justify a finding in accordance therewith, must have more convincing force than the contrary evidence."

An edited excerpt from *Lavender v. Kurn*. Whenever facts are in dispute or the evidence is such that fairminded men and women may draw different inferences, the jury is to settle the dispute by choosing what seems to them to be the most reasonable inference in the light of the evidence which has been presented to that jury.

Sometimes a jury hearing evidence over a period of several days, as you have done in this case, will find that there are discrepancies between the testimony of one person and that of another. I will give you the rules which apply to that. B.A.J.I. 26:

"In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed [766] to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of the witness' testimony, or by evidence that pertains to the witness' motives."

B.A.J.I. 27-A:

"Discrepancies in the witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons

witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and it should be seriously considered."

B.A.J.I. 28:

"In weighing the testimony of witnesses, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by [767] these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor any party? Was he, in other words, a biased or an impartial witness? What degree of intelligence, what quality of memory, and what grade of moral purpose, so far as concerns this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused his testimony to appear on the surface as being less trustworthy than it really was? Was the witness dealt with fairly by counsel, or was he, without fault of his

own, confused or embarrassed and thus placed in a light not truly representative?

“Should you consider any of these questions, either in your own private reasoning, or in open [768] discussion, you must look for an answer only to the evidence admitted in the trial of the action.”

B.A.J.I. 31:

“In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of the witnesses who have confronted you on the witness stand.”

B.A.J.I. 33:—

Mr. Gallagher: 32, your Honor?

The Court: 33.

Mr. Gallagher: Thank you.

The Court: “The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the [769] case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opin-

ion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound."

B.A.J.I. 33-A:

"If you find there has been a conflict in the testimony of expert witnesses you must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified."

Now, no expert and no certificate of inspection may suffice for your duty. To the extent that those things are in evidence, consider them as evidence, to be weighed with all the other evidence.

But the sole duty, so far as the problem in this court is concerned, and so far as that problem exists between these litigants is for you. It is your judgment, and you must approach it independently of what any witness for either the plaintiff or the defendant, or any other body or inquirer has had in their experience, insofar as that has been related to you. [770]

All former inquiries have had a somewhat different purpose than the inquiry which is here today. This one is individual, that is, the inquiry which has been made in this case is individual to the purposes and requirements of this case, and to the extent that other matters, such as the inspection and the observations of witnesses who have come here and told you what they have observed, are con-

cerned, you should bear in mind that it is up to you and you have the responsibility of deciding this case, and you do not simply rubber-stamp any opinion which has been presented here, regardless of the form of evidence by which it has been presented.

I see in my notes I have put down "opinions of witnesses not a substitute for the jury," and that summarizes what I have taken more words to say.

The plaintiff in a lawsuit starts that case by filing a complaint, and that complaint places the defendant upon notice of what the defendant is accused of.

Now, I am not going to read the entire Complaint to you. But I will read an excerpt from it which states what Mrs. Hutchison contends, insofar as the heart of her cause of action, the disputed portions of it, are concerned here.

Now, it has not been disputed, for instance, that she is the executrix or administratrix—I forget which—in [771] any event, the person handling the affairs of the deceased or that she is the widow of the deceased, and so on. All those things she had to set forth in her complaint.

But I will read what the lawyers call the charging language of her complaint now at this time, insofar it concerns the first cause of action.

Paragraph VIII: "That on or about said 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and

performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween decks; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main [772] deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies

in direct proportion to the dangers known to be involved in the work.

To put the matter another way, the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary, [773] and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and he may rely and act on that assumption.

You will note throughout these instructions the frequent use of the word "reasonably". Reasonably is one of the key words in the instructions, but always consider it in relation to all the instructions.

The fact that Nathanael Patrick Hutchison had not yet signed Articles at the time of receiving his personal injuries in no way deprives him of his rights under the law upon which this action against the Pacific-Atlantic Steamship Co. has been predicated.

The Linfield Victory was in commission and Hutchison was an able bodied seaman performing deck maintenance duties aboard her. The fact that he had not yet signed the Articles might affect the duration of his service and his right to abandon his job, but did not qualify its incidence or define

its characters provided he was actually an employee. Whether or not he was actually an employee is, of course, a question of fact and for you to determine in the light of all the evidence.

In the event of injury Nathanael Patrick Hutchison was [774] entitled to the rights which the court has referred to and will refer to in these instructions, unless he had actually left such employment and whether or not he had commenced employment or whether or not he had left the employment are questions that are exclusively for the jury.

Portions of the title of the Commentary on the Jones Act in Title 46:

“The gist of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove negligence, for unless the seaman can establish negligence of the owners of the vessel, or her officers, agents, or employees, no liability exists.”

The negligence of the owners of the vessel may consist in the failure to supply and maintain a vessel properly equipped and manned or the negligence of the master or members of the crew.

Now, the exact day, the exact hour of the incident, which has been alleged to have been an accident and which has been alleged to have been due to the failure of the defendant to use reasonable care in providing a reasonably safe place in which to work, the exact time is not material.

The exact time of the events, if they flowed from defendant's negligence, need not be spelled out in

detail by the evidence. But if plaintiff is to recover, the fact [775] of negligence must be proved.

Mr. Hutchison must have been injured while in the course of employment, in order for Mrs. Hutchison to recover damages here. And, of course, all the other things which I tell you must be established, you must find from the *evidence have* been established, or if you find to the contrary, you will not return a verdict in her favor.

Now, negligence has been defined in the law for a long, long time, and I am going to read you the classic definition which we learned in about the first week of the first year of law school. And although I think I know it, all of us know it pretty well by heart now, because it deals with many of the frequent problems which arise in the law, I am going to read it to you. B.A.J.I. 101:

“Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do some act which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.”

101-A: “Negligence is not an absolute term, but a relative one. By this is meant that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light [776] of all the surrounding circumstances, as shown by the evidence.”

101-B: “You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally

skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct."

102-A: "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required increases, as does the danger that reasonably should be apprehended."

Now, negligence in itself is not enough, any more than the mere fact of death is enough. There must be what we call in law proximate cause. 104:

"The proximate cause of an injury is that cause [777] which, in natural and continuous sequence, unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury."

104-A: "This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and the omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a

case, each of the participating acts or omissions is regarded in law as a proximate cause.”

Now, we have in law another phase of negligence which it is your duty to consider here, and that is contributory negligence. 103:

“Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.”

The fact I have defined negligence and contributory [778] negligence is not to be taken by you as an indication that either exist. Those are questions of fact which will be resolved by you.

Now, contributory negligence, however, has been mentioned in the instructions for a very important reason. In the law which applies to this case—although probably some of you know it doesn't apply to your ordinary activities in driving an automobile in California, or other matters, but it does apply to circumstances such as we have here—is that if a person injured is guilty of contributory negligence, then we get into what is called comparative negligence. That means simply that the jury, if they believe that there was negligence on the part of the defendant and they believe that the plaintiff was guilty of some contributory negligence, that the jury shall then assign percentages of negligence to both sides, and shall determine what the total damage was which was suffered and then diminish the amount of that damage by the percentage that

the contributory negligence entered in to producing the result.

If, for instance, and this is just an illustration—I don't suggest to you it is true, but you should consider whether it is, and it is an illustration of that instruction—you believe from all the evidence that Mr. Hutchison was feeling rugged—whatever that means, but you have heard the testimony—and that he had a hangover, then you would [779] consider whether or not a man, knowing that he felt rugged and having a hangover would go into the type of act or acts in which he was engaged at the time of the injury.

That is, would he go about masthouses and climb up and down ladders or would he take a sick-leave? Was it ordinary prudence, was it reasonable care for him to do that?

If you find that it was not or if you find there was some other contributory negligence—at the moment as I sit here that is the only thing in the evidence which occurs to me, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is, negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed.

B.A.J.I. 134: "In law we recognize what is termed an unavoidable or inevitable accident. These

terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an [780] accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

There are two causes of action. Lawyers speak of the basis of a lawsuit or the claimed basis of a lawsuit as a cause of action and each particular basis is a cause of action in itself. Mrs. Hutchison in her Complaint has set forth two causes of action. We have been discussing the first cause of action.

Now, in the first cause of action, if it existed, it existed fully at the last minute of life of Mr. Hutchison, because it is Mr. Hutchison's right to collect for conscious pain and suffering which he sustained as a result of the occurrence, provided, of course, you find all other things to be in his favor. And under the law as it exists today the right which a person has to collect for those things is inherited by their heirs.

Now, the matter of placing a money value on conscious pain and suffering is something which is very difficult to do. It has been suggested by Mr. Simpson, because the law requires him to suggest something, so he has selected a figure. But you are to determine, if you find in favor of the plaintiff, what the conscious pain and suffering, if it did exist on the part of Mr. Hutchison, should be compensated, [781] how it should be compensated in

terms of money. Not because that is an ideal way perhaps to compensate for pain and suffering—pain and suffering being one of those intangible things we have in life—but there just is no other way in which the law can compensate for it.

Now, in the old days of England, when these laws were being formed—and I don't mean by this instruction to suggest any sum or to suggest any particular circumstance, because you have heard the evidence and it is for you to decide. But just to give you a range here or a little of what the experience of the law has been, in the old days when this law was being formed, if there were a circumstance that a jury or a judge found that there had been a legal breach, but that it was very trivial and still they wanted to recognize it and give something as a token, but no more than a token, they would assess six cents. Six cents at that time must have had some particular monetary value, it was some monetary unit in England.

Now, I am not suggesting that that be your verdict or that it not be. I am just telling you the low limit to which the law has gone, where they have felt it was the proper thing to give some recognition to a cause of action, but not to give it any money recognition.

And if you follow law cases in the papers you might have noted here and there that there was a six-cent verdict [782] in this country. I think one of our national radio commentators got sued for libel and a jury somewhere awarded six cents damages, meaning he was hurt but not much.

Now, this is entirely a problem for you. I am not suggesting to you that your verdict should be six cents or \$25,000.00 upon the first cause of action, if you find there was such a cause of action, but I am telling you these things for your use in discussing these matters.

B.A.J.I. 172: "You may not include in any award to plaintiff any sum that you might add for the purpose of punishing the defendant, or to make an example of it for the public good or to prevent other accidents."

Such damages would be in the nature of punishment. They are what the law calls punitive or exemplary rather than compensatory, and the law does not authorize that type of damage in this action.

175-E: "While the amount of the verdict is left to your sound discretion,—” if you find there should be a verdict “—your award must be just and reasonable, and must be based upon the evidence introduced. This does not mean that any witness should have expressed an opinion as to the amount of pecuniary loss suffered by the plaintiff. It means that your [783] judgment may not be arbitrary or fanciful, but must have evidence behind it.”

We have talked a lot about evidence. It might just be of use to you—I think it should be included in a charge—to read you a law dictionary definition of evidence. I have selected the one which appears in Black’s Third Edition at Page 696:

“That which furnishes or tends to furnish proof.

It is that which brings to the mind a just conviction of the truth or the falsehood of any substantive proposition which is asserted or denied.

“That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. The word ‘evidence’ in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation * * *”

Now, the evidence here with respect to what the plaintiff claims was failure to search for Mr. Hutchison, under what she claims were circumstances that were such as to require a search, relates only to that first cause of action.

You will recall that there has been an issue tendered here as to how long, if at all, Mr. Hutchison was conscious [784] after he fell into the shaft, and the only item of damage which is claimed on that first cause of action is damage for conscious pain and suffering.

Now, as has been argued here, there might have been some palliative or comforting treatment, so that evidence was admitted upon that first cause of action. It is not to be deemed to apply to the second cause of action. As I told you, there are two causes of action, each of which should be borne in mind separately.

However, the law respecting negligence, the law respecting contributory negligence, the law respecting damages, which I have given you, all applies to the second cause of action, except that with

respect to damages there are additional matters which I should call to your attention.

Liability, if it exists, depends on the same facts respecting negligence, if it existed, contributory negligence, if it existed, and the need for proximate cause, and so forth, as the first cause of action.

Now, I will read you just the charging part of the Complaint which Mrs. Hutchison has filed on that second cause:

“That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, [785]to-wit, the 30th day of April, 1951, the exact date and the time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent of the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages”.

You must bear in mind that the first cause of action is just the cause of action that Mr. Hutchison had during his lifetime, if there is a cause of action there. And that if Mrs. Hutchison recovers she recovers as the representative of his estate, and any damages on the first cause of action then go by inheritance to those who are designated by law as succeeding to his cause of action.

That second cause of action is different in this respect:—in all other ways it is the same as the first—in this respect it is different from the first, it is Mrs. Hutchison's claim, not his. It is her claim

for damages because she has lost her husband, who she says was a substantial contributor to her support, and she says, "I have been damaged in that regard by reason of the same facts." Minus the pain and suffering, of course, but by the same facts which produced death in the partial bread-winner of her family.

So you see this is her cause of action and not his, [786] and if you decide this one, you decide it in her favor for the damage which she has suffered.

In determining the pecuniary loss to which I have referred, you may consider the age of the deceased and of Emma Hutchison, beneficiary of this action; the state of health of the deceased and of Mrs. Hutchison, as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies in life, as shown by the evidence;

The disposition of the deceased to contribute financially to the support and other advantages of the beneficiary and his actual habits and practice in respect to the making or not making such contributions;

The ability of the deceased and his inclination to and habit of performing or not performing services having a monetary gain for the beneficiary. By "beneficiary" I mean Mrs. Hutchison;

What the deceased was earning at the time of his death, what he customarily earned prior thereto and within a time reasonably to be considered, and what his earning capacity was; what his personal

expenses and other charges and deductions against his earnings were, and such other facts shown by the evidence as throw light upon the question of what pecuniary benefits the beneficiary might reasonably have been expected to receive from the deceased had he [787] lived beyond the untimely death in question.

With respect to the matter of life expectancy, you will keep this point in mind, if you should decide for the plaintiff: The prospective period of time that will be of concern to you, in your effort to find the pecuniary loss of the beneficiary, is only the shorter of the two life expectancies, that of the beneficiary or that of the deceased, because manifestly one could not derive financial benefit from the life of another for longer than while both are living.

According to the Commissioner's 1941 Standard Ordinary Table of Mortality, which is a book of reference to which the courts look, the expectancy of life of Nathanael Patrick Hutchison at age 44 was 26 years. And the expectancy of life of Emma Hutchison at age 53 was 19 years.

Now, there are small fractions there which are not of sufficient consequence to read to you. This fact, of which the court takes judicial notice, that is, what the mortality tables show concerning prospective life, is now in evidence to be considered by you in arriving at the amount of damages, if you find that plaintiff is entitled to a verdict upon her cause of action.

However, the restricted significance of this evi-

dence should be noted. The life expectancy as shown by the mortality tables is merely an estimate of the probable [788] average remaining length of life of all persons in our country of a given age, and that estimate is based on, not a complete but only a limited record of experience.

Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger and disease of people of that age.

Thus, in connection with this evidence you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits, risks, securities and activities of the person whose life expectancy is in question. And as Mrs. Hutchison had the shorter of the periods of life expectancy, you may consider his with respect, of course, to the probabilities of extended life, but if you use these in any way in measuring the period of time that Mrs. Hutchison could reasonably expect the contribution, you must accept the shorter, that is, the 19 years, because that was her life expectancy under the mortality tables.

Those were 301-P and 177 as a basis with interpolations.

Now, all persons are presumed to use reasonable care. That is a presumption. It applies in this case to Mr. Hutchison in his activities at and about the time this incident occurred. It applies to the defendant corporation at and about the time this occurred. It is a presumption.

You are to look only to the evidence in the case.

Attorneys have, from time to time, made objections but those were addressed to the court as a matter of law, and that is one of the things their clients pay them to do.

You are not to be guided by the reasons for rulings on objections, but to consider the evidence, such evidence as did get in, and not speculate upon what evidence might have gotten in had there not been objections or other rulings of the court.

Of course, you being the quality of people you are, I am only mentioning this because it is a standard part of jury instructions. I know you will follow it. You are not to be guided by any feeling of passion, prejudice, pity or sympathy. Decide the case upon an intellectual basis, that is, an analysis of the evidence and the measuring of that evidence by the law which the court has given you.

Mr. Bailiff, I asked the secretary to do some typing for me. Did she send it in?

The Clerk: Yes, sir.

The Court: You will be given general verdicts. By general verdicts, I mean there are forms of verdicts, four in number, which you can fill in, finding either for the plaintiff in a certain amount, one verdict for each cause of action, or finding for the defendant.

Now, if you find for the plaintiff the court submits to you certain interrogatories, which are to be answered. [790] In each instance the verdict and the interrogatories shall be answered by the foreman or the forelady, signing and filling in the appropriate blanks. That should be done in ink.

That should be done by a person who can stand up in court and read them. Some people are timid, and I wouldn't assign the duty to such a person. Each interrogatory must be answered with the same unanimity as the general verdicts are reached.

I will read them to you. "If the verdict is in favor of plaintiff,—" Counsel, these are exactly the ones which were in the file, which have been referred to as the court's.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

By that we mean what was her pecuniary loss at the moment of his death, because she had been precipitated into the state of widowhood by that death. It doesn't have any reference to what it was by reason of a fact that he was killed in an accident. If he had died of pneumonia or dropped dead of heart failure she, as the widow, would have suffered a pecuniary loss, and that is what we mean by Interrogatory No. 1.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

A Juror: That has to do with cause of action No. 2, does it not? [791]

The Court: No. 2. Actually, it is a question which might have applied to her or to her family advisers, independently of the lawsuit. But, of course, it will only have pertinence here if you find a verdict for her upon cause of action No. 2.

The Juror: I just want to be sure you were taking No. 2 first, before No. 1.

The Court: "Interrogatory No. 2: Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

"Answer 'Yes' or 'No.'"

Now, of course, before you would find a verdict in favor of Mrs. Hutchison upon cause of action No. 2, you would have found that the defendant was guilty of negligence and that such negligence was a proximate cause of an injury from which Mr. Hutchison died, and that answer is included in a verdict in favor of the plaintiff.

But you would also then answer this interrogatory, "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?"

We mean by that the contributory negligence that I have dealt with in these instructions.

"Interrogatory No. 3: A. If your answer to Interrogatory No. 2 is 'yes', state the extent in percentage that the negligence of Nathanael Patrick [792] Hutchison proximately contributed to his death."

That is, if you think he was contributorily negligent, was that contributory negligence one per cent or was it one hundred—well, if it was 100 per cent it would mean that it was solely his negligence—or was it 99 per cent, or was it some percentage in between.

If you find in favor of Mrs. Hutchison and you find that Mr. Hutchison was guilty of contributory negligence, you put the percentage in here.

"B. Translate the percentage into dollars as a

percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?"

That would be a sum of money, and to just stay out of sums of money that would apply to this second cause of action, it would be one cent, two cents, ten cents, or whatever it happened to be.

I use those pennies to just not suggest any sum within sums which would be considered by you in respect to the second cause of action.

"Interrogatory No. 4: Subtract the amount of money stated by you in answer to Interrogatory No. 3 B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?" [793]

That is, you would have in Interrogatory No. 1 found how much she lost by reason of losing her husband, how much in terms of damages from that fact, and measured by all the rules I have given you. Then you would have, in answer to another interrogatory, found the percentage that he was contributorily negligent, if you have found there was contributory negligence.

Now, in answer to No. 4 you give the amount that is left of the damages which she has sustained after making the diminishment required by reason of his contributory negligence, if you find that there was such negligence.

I keep saying "if you find" in these things because I want to obey one of the cardinal rules of judging, which is that the judge must never suggest to the jury what the verdict should be, unless

in certain rare cases, and this is not one; an entirely different type case than this. A judge must leave it to the jury. So a judge must habitually say, "If you find" so that you are continually alerted to the proposition I am not suggesting any particular verdict by these instructions.

Those are all the interrogatories.

The foreman will fill in the answers. The foreman will fill in the general verdicts, and they will be returned with you.

We have the aids in your deliberations of the exhibits, [794] which will be sent to you in the jury room. If you need to have any evidence read, if you really need it—bear in mind that it takes a little time, so don't ask for it lightly—but if you really need it, come down and ask for it. Just let the bailiff know.

If you need further instruction, come down and ask for it. The customary way of letting the judge know that you need these things is for the foreman to send the judge a note through the bailiff. Even at that, you don't talk to the bailiff about the case. You tell him to please take the note to the judge. You just don't talk to anyone about the case, except among yourselves. But among yourselves you discuss it freely.

It being noon, as soon as we have heard the exceptions, if any, or the suggestions or amendments to the charge, if any, we will send you to lunch and then you take whatever time is reasonably necessary to work out proper verdicts in the case.

A Juror: May I be excused now, the alternate?

The Court: You are the alternate? We will find out in a minute. Perhaps not a minute, but we will find out shortly. I have it in mind.

The court will now hear exceptions, suggestions for amendments, deletions, or corrections of the charge. You will please approach over here at the side. [795]

Mr. Gallagher: May I suggest, your Honor, wouldn't it be proper to instruct the jury not to deliberate yet, but to send them to lunch——

The Court: No.

Mr. Gallagher: ——so they won't have to sit here?

The Court: They won't have to sit long. Except in a couple of extraordinary cases I have had, the statement of these matters has never taken more than five or ten minutes, and I am not going to let it take more here, and I don't think anyone would offer more here.

So I will just tell the jurors, remain in the box and don't talk about the case yet, because it isn't submitted to you until the instructions are completed, and I might have overlooked something which counsel will bring to my attention.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

The Court: Before you begin, Mr. Gallagher, if you except to the refusal of the court to give any one of the charges you offered, refer to it by number and hand it up to the court. I will take a look

at it. No argument on it, please. State the exception. That will be enough.

Mr. Gallagher: Before I commence to do that, I respectfully take an exception to the remarks made by the court, in the presence of the jury, that, in effect, ordinarily competent lawyers would not make exceptions which [796] took more than five or ten minutes.

I will state to your Honor that it is impossible for me to state the exceptions that I have to the charge which you have given in any five or ten minutes. It is physically impossible.

The Court: How much time will it take?

Mr. Gallagher: It will take me one hour.

The Court: I will grant you one-half hour. I will send the jury out for a half an hour.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Members of the jury, circumstances have been directed to my attention, which I had overlooked, which indicate that we will be several minutes at this. I think you will probably be more comfortable in the jury room. So all of you go up there, but don't discuss the case. The bailiff will notify you when to return.

(Whereupon, the jury retired to the jury room.) [797]

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

The Court: The charge didn't take an hour, Mr.

Gallagher, while it took me more than an hour to read your proposed instructions.

You can refer to them by number in less, so I will expect you to conclude by 12:30. It is now four minutes after 12:00.

Mr. Gallagher: Is your Honor restricting me to one-half hour?

The Court: Yes. Knowing your abilities and also knowing your propensities, I restrict you to one-half hour.

Mr. Gallagher: I respectfully object to that restriction and contend that it is impossible.

The Court: I don't care about your contentions. State your exceptions, state your suggestions.

Mr. Gallagher: Now, the defendant excepts to the instructions given by the court as follows:

The court has incorrectly defined inference by reading to the jury the definition from the dictionary.

It is not a correct or legal definition of inference as ——

The Court: Are you satisfied with the one in B.A.J.I.? I read that one, too, but if you except to the one that I read, I will re-read the one in B.A.J.I. and tell them that they are [798] limited to that.

Mr. Gallagher: I do accept the definition, if it is in BAJI.

The Court.: All right. I will amend the charge in that respect. Next subject.

Mr. Gallagher: I except to the instruction wherein the court told the jury that the fact that

the United States has or had an interest in the vessel *Linfield Victory* does not affect the responsibility of the defendant upon the following grounds:

No. 1——

The Court: I don't care what grounds you state. I am going to let the charge in that respect stand, in view of my research on it and in view of the argument which we have heretofore had.

Your exception is sufficient for the purpose of this court.

Mr. Gallagher: I respectfully request permission to state it for the benefit of the United States Court of Appeals.

The Court: They will know what you are getting it.

Mr. Gallagher: I except to the instruction given by the court that the operators of the *Linfield Victory* are responsible for the physical structure of the ship and have placed upon them any burden to change the physical structure [799] of the ship upon the ground that the charter party prohibits it, without the consent and permission of the Government, the owner.

The Court: That is frivolous. You needn't go further on that one.

If you want an extended instruction, I will tell them exactly how I feel on that, which is very different and which I am sure the court would uphold.

No one can by contract take over a property in a method which gains immunity from acts of negligence to others.

Mr. Gallagher: I except to the giving of the in-

struction with reference to presumptions, because the court has not told the jury that they are not entitled to indulge in any presumptions excepting those specifically referred to by the court.

The Court: Refused, but noted.

Mr. Gallagher: I except to the instruction given by the court that any party who intends to deny the *affect* of a presumption must present evidence to the contrary.

The Court: I simply read B.A.J.I., didn't I? What number was that?

Mr. Gallagher: 22-B, but that doesn't make it good.

The Court: All right. Exception denied. Anything that appears in B.A.J.I., if it is applicable to a case, the court considers as good, considering the authority of that [800] work and the way in which it is universally or almost universally respected.

The question of presumption and burden of proof is applicable to every case, so the exception is merely noted. I will not amend it.

Mr. Gallagher: I except to the instruction that whenever facts are in dispute or the evidence is such that fair-minded men and women may draw different inferences, the jury is to settle the dispute, upon the ground that that is not a question of fact for the jury to determine, whether the evidence is in such state that fair-minded men and women may draw a different inference.

The Court: I had that case of *Lavender v. Kurn* sheppardized and I modified the language of Kurn

v. Lavender as I felt that the present complexion of the Supreme Court would have modified it if they were acting upon it as language of instruction.

Exception noted. No further argument on that one.

Mr. Gallagher: I except to the instruction that the court gave to the jury with reference to the Certificate of Inspection, which has been introduced in evidence, wherein the court instructed with reference to questions of fact and deprived the defendant of its right to a jury trial.

The Court: I told them to consider it as evidence. It is evidence, the same as all the other evidence. [801]

Exception noted, and I will not instruct further on that.

Mr. Gallagher: I except to the instruction with reference to your Honor's discourse on the Certificate of Inspection for another reason, that it ignores the testimony of the witness Dyer as to the extent of the inspection, and it ignores the presumption that official duty has been performed and that it is in itself evidence, because it is a disputable presumption, and the jury must find in accordance with it, in the absence of evidence direct or indirect, to the contrary.

The Court: Exception noted.

Mr. Gallagher: I except to the instructions given by the court for the reason that the court did not state to the jury the issues, the specific issues as raised by the pleadings and state to the jury that their consideration of the evidence is to be restricted to those specific averments of alleged negligence.

The Court: I will undertake to amend that.

Mr. Gallagher: I except to the——

The Court: Just a moment, until I make an adequate note, because I can't remember all you say.

All right. Proceed.

Mr. Gallagher: I except to the instruction, the part of the instruction as follows:

“In the absence of knowledge or notice to the contrary [802] and in the absence of circumstances that *caution or* would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and may rely and act upon that assumption” upon the ground that everything connected with the masthouse and the shafts, and so forth, was plainly obvious and there is no basis in the evidence for that instruction.

The Court: That instruction was based upon BAJI. Exception noted.

It was BAJI. I think I read it verbatim.

Mr. Gallagher: I take exception to the instruction that the fact that Nathanael Patrick Hutchison had not signed Articles at the time of receiving the personal injuries in no way deprives him of his right under the law, upon the ground that that instruction assumes as a fact that he had some right under the law. In other words, to collect damages.

The Court: Exception noted.

Mr. Gallagher: And the same exception is taken to the instructions given by the court with reference to Mrs. Hutchison's rights under the law.

The Court: Noted.

Mr. Gallagher: I except to the instruction of the court, "That in the event of injury Nathanael Patrick Hutchison was entitled to the rights which the court has referred to and [803] will refer to in these instructions, unless he had actually left such employment, and whether or not he commenced employment or whether or not he left the employment are questions that are exclusively for the jury," upon the ground that that instruction calls the jury's attention to the assumption that Nathanael Patrick Hutchison had a legal right to recover.

The Court: I think he did, whether he was a member of the crew or not, if he were an invitee or even a licensee.

But I didn't want to go into those things, since there has been no contention here. I could have expanded for an hour upon the rights of persons, other than crew members.

I think, in order to keep the instructions to where they would be useful to the jury and still be the law, I had to condense that to the relevant portion of the law. The exception is noted.

Mr. Gallagher: I except to the instructions of the court wherein the court defines negligence generally, wherein the court refers to acts or omissions with reference to the defendant, upon the ground that the court has thereby expanded the issues and has not confined the jury to a consideration of specific alleged failures, which do not include any acts on the part of the defendant or its employees.

The Court: Amendment to the instructions denied [804] except insofar as it will be covered by my further instruction, that they are restricted to acts of negligence charged in the Complaint.

I thought I gave that, but I do not see it specifically in my notes, so I might have omitted it.

Mr. Gallagher: I except to the instruction given by the court that at the time Nathanael Patrick Hutchison suffered his injuries he was acting in the performance of duties as a deck maintenance man.

The Court: I don't think I told them that he was.

Mr. Gallagher: I think you did, your Honor.

The Court: All right. I will tell them it is a question of fact.

Mr. Gallagher: I except to the instruction that negligence is the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do,——

The Court: Oh, that is Blackstone, Chitty and all the other people——

Mr. Gallagher: May I finish my exception, your Honor?

The Court: I read it from BAJI.

Mr. Gallagher: ——upon the grounds that the allegation, so far as the defendant is concerned, relates solely to alleged omissions.

And unless the court says that that applies to Mr. [805] Hutchison, but that only evidence which

may show alleged omissions applies to the defendant, the instruction is prejudicial.

The Court: Exception noted.

Mr. Gallagher: I take exception to the remaining instructions which refer generally to negligence, without confining it to the particular and specific acts of alleged omissions set forth in the complaint, so far as the defendant is concerned.

I except to the instruction given by your Honor with reference to the increase or decrease in the amount of care which must be exercised, because the court pointed that at the defendant and did not say that Nathanael Patrick Hutchison was required to do the same thing.

The Court: If I instructed the way you want me to it would take me a whole week. Denied.

Mr. Gallagher: I take exception to the instruction given by the court with reference to contributory negligence, wherein the court told the jury that the only thing it could think of was the testimony with reference to the fact that he felt rugged and might have a slight hangover, upon the ground that that is an instruction with reference to fact which deprives the defendant of a right to a jury trial.

The Court: What other possible basis for contributory negligence is suggested by the evidence? Tell me and I will [806] amend my comment to the jury.

Mr. Gallagher: If the man climbed over the pipe railings, in the full possession of his faculties, at a time when he could see what he was doing,

that he was guilty of gross negligence, and such negligence would be the sole proximate cause of his injury and would, at least, be a proximate cause to a great extent.

He could have climbed up the escape shaft, as plaintiff claims, in utter darkness. If he did so he was guilty of gross negligence which would proximately contribute to his injuries, and so forth.

Those are not the only things he could have done or omitted. And I say that the court cannot tell the jury what is the extent of contributory negligence or what facts they can consider in determining that issue.

The Court: I can comment on the evidence.

Mr. Gallagher: I contend it is a violation of our constitutional right to a jury trial.

Now, I take exception to the instruction given by your Honor, where you told the jury that at the very time he suffered his personal injuries he was actively engaged in the course of his employment, or was in the course of his employment.

The Court: If I told them that, I didn't mean to and I will make a correction. [807]

Mr. Gallagher: I take exception to the instruction——

The Court: Just a moment, until I make a note. All right.

Mr. Gallagher: I take exception to the instruction given by your Honor to the jury, wherein you stated specifically that it didn't make a particle of difference what time this alleged accident occurred, for the reason that the course of the em-

ployment is a very essential issue here and the time is, therefore, of material importance and it is the burden of the plaintiff to prove that the injuries were suffered in the course of the employment and the time is a very material element in determining that factor.

The Court: Noted.

Mr. Gallagher: I except to the refusal of the court to submit to the jury an interrogatory requesting the jury to state on what date Nathanael Patrick Hutchison suffered his injuries and at what time on such date.

The Court: Let me remind you that you withdrew your proposed interrogatories, which were very specific on that, and asked me to give the ones I had at the last trial. I took the ones that I had at the last trial verbatim.

Mr. Gallagher: I would like to call your Honor's attention to something. I proposed a specific——

The Court: Didn't you yesterday withdraw all your proposed interrogatories? [808]

Mr. Gallagher: I withdrew the ones that I had requested before the end of the first trial. I have not withdrawn any requests for any special interrogatories lodged in this court after the commencement of this trial.

The Court: You can't play here as if you were playing with marked cards. I have submitted a sufficient group of instructions to the jury. I take notice of that fact that you came into this court with an announced intention to appeal if you lost, and to trick this court into error.

Mr. Gallagher: I have made no statement——

The Court: You didn't use the word "trick".

Mr. Gallagher: ——I was going to try to trick the court——

The Court: You didn't use the word "trick". But you told me that I couldn't try this case without error that you could get it reversed on.

Mr. Gallagher: I told you that?

The Court: Yes, you did. I think you don't know how strenuous your conduct has been. Your face has been twitching, you have been blinking like Susie on television. You have been an absolutely intemperate advocate here.

Mr. Gallagher: Your Honor, I lodged a written request for special interrogatories with the clerk yesterday morning at 8:57, or 8:53.

The Court: I read it. It is denied.

Mr. Gallagher: If your Honor please, the defendant takes exception to the refusal of the court to give its proposed Instruction No. 11 upon the ground that the matters [809] covered by that instruction have not been covered by the instructions given.

The Court: Will you pass it up, please?

These go from 8 to—that is a hiatus; from 8 to 23.

Read me enough of 11, Mr. Gallagher, that I will have it recalled to my mind.

Mr. Gallagher: Your Honor, the subject of 11 is to set forth the issues of fact which the court is submitting to the jury, with reference to the claim of actionable negligence, and also tells the jury that there is no burden on the defendant to

offer any evidence whatever for the purpose of disproving the averments set forth in Plaintiff's Complaint, and that the averments of Plaintiff's Complaint do not constitute the slightest evidence. Those have not been covered by the instructions given.

The Court: Exception noted.

Mr. Gallagher: I take exception to the refusal to give defendant's proposed Instruction No. 11-A for the same reasons which I have referred to with respect to defendant's proposed Instruction 11.

The Court: Noted.

Mr. Gallagher: I take exception to the refusal to give proposed Instruction No. 13, which would have told the jury that they are not permitted to determine what issues of fact are raised by the pleadings.

The Court: They haven't seen the pleadings in this case, nor will they. I read them the charging language.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction 14-A, which——

The Court: What are the first words of it?

Mr. Gallagher: "The court will call to your attention certain specific averments set forth by the plaintiff in her Complaint."

The Court: All right, that is enough. Denied; noted.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 15, which would have told the jury that there is no claim of the plaintiff to the effect that any appliance in the masthouse was defective and points out the specific claim which she does make.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 15-A for the same reasons stated with respect to the refusal to give No. 15.

The Court: Denied. It is noted, but I refuse to give it.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 16-A upon the ground that the principles of law set forth therein have not been covered by the instructions given by the [811] court.

The Court: Will you read me the first words of 16-A?

Mr. Gallagher: "There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2."

The Court: Noted and denied. When I said "noted" I mean it is noted for your purpose on appeal.

When I say "denied", I mean I refuse to read it to the jury now, for all reasons which are legally applicable to such refusal.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 17 upon the ground that it states principles of law, which have not been covered, and as to which the defendant is entitled to have the jury instructed.

The Court: The first words, please.

Mr. Gallagher: "Insofar as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides,——"

The Court: Denied. Noted and denied. It is covered by other instructions. [812]

Mr. Gallagher: I respectfully except to the court's refusal to give defendant's proposed Instruction No. 18 upon the same grounds and each of them heretofore stated.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 66, which has to do with the——

The Court: All right. I think I have that one here. It was filed in sequence.

Mr. Gallagher: In the light of the argument made by Mr. Simpson to the jury, that it was our obligation to bring in some witnesses, the refusal to give that instruction is particularly prejudicial.

The Court: Noted and denied.

Mr. Gallagher: The defendant respectfully excepts to the refusal of the court to instruct the jury with reference to what would constitute negligence on the part of the deceased himself.

The Court: Noted and denied. I think I have covered it adequately.

Mr. Gallagher: The defendant respectfully excepts to the refusal of the court to instruct as requested in No. 28, that a seaman has a right, under

certain circumstances, to quit his job at any time he may see fit to do so.

The Court: Denied. That is exactly contrary to what [813] you have been arguing here.

Mr. Gallagher: I take exception to the refusal of the court to give proposed Instruction No. 30-A upon the ground that that would tell the jury what is actually within the—an act within the course of employment and would restrict the jury to the proposition that if the plaintiff doesn't prove that particular element by a preponderance of evidence that she could not claim that there was any failure to furnish a reasonably safe place to work, or that he was actually engaged in the course of his employment.

The Court: The instructions in the file go to 30, and then to 31. When did you file 30-A?

Mr. Gallagher: I gave that to—well, it was last week, your Honor.

The Court: Then the clerk probably has it among the unfiled ones.

Did you file it or did you just run in and hand it to my secretary? Lawyers have a way of doing that, and that is not filing things.

They hand them to my law clerk and he treats it as something they are asking for research upon.

Those things which are intended for the court's attention should be handed to the clerk.

Mr. Gallagher: Isn't it there?

The Court: Well, we are searching for it. [814]

You may read it. I hope it isn't one of your long ones.

Mr. Gallagher: Well,—

The Court: Read enough of it that I can see if it has legal vice in it.

Mr. Gallagher: “A seaman does not suffer a personal injury in the course of his employment, unless less at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer, or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment.”

The Court: Covered by instructions given. Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 31, or in lieu thereof 31-A, which has to do—

The Court: Just a moment, until I find it here. Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to give the proposed defendant's instructions with reference to foreseeability as being one of the essential elements of actionable negligence. In other words, [815] Nos. 32, 32-A, 33, 34, 35, 35-A, 36, 36-A and—that is it. 36-A is the last one. Upon the ground that your Honor has not fully or correctly instructed the jury with reference to foreseeability.

The Court: Noted.

Mr. Gallagher: I respectfully except to the refusal of the court to instruct the jury, as requested by the defendant, that the pipe railings surrounding the ventilator shaft were, as a matter of law, a safety appliance.

The Court: Denied. Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to instruct the jury that there was no duty on the part of the defendant to furnish an appliance which would be reasonably safe for any seaman, unless such seaman was exercising ordinary care for his own safety and preservation, in the use thereof, or in the vicinity thereof.

The Court: All right. Next one.

Mr. Gallagher: I respectfully take an exception to the refusal of the court to instruct the jury in accordance with defendant's proposed Instruction No. 52, to the effect that from the disputable presumption favoring Mr. Hutchison the jury could not infer or presume any negligence on the part of the defendant.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court [816] to instruct the jury that the law did not impose upon a defendant an absolute duty of furnishing an accident-proof ventilator shaft, or that the masthouse had to be absolutely safe, to the end that it was impossible for a seaman to be injured.

The Court: I have your point.

Mr. Gallagher: I respectfully except to the refusal of the court to give the defendant's proposed

instruction to the effect that the defendant isn't guilty of actionable negligence merely because it fails to anticipate carelessness or lack of care upon the part of an employee.

The Court: Denied.

Now, Mr. Gallagher, you are going through, apparently, all of your instructions and taking time to enumerate things we have been over before.

You have gone substantially past the time and it looks as if you carry on the way you are, you are going to take the full hour that you told me you were going to take.

Mr. Gallagher: We can shorten it.

The Court: You are not going to run this courtroom. Proceed rapidly, expeditiously.

Mr. Gallagher: May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and [817] that anything which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, "May I have a general exception upon the ground that the court committed error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court?"

The Court: A general exception is noted.

Mr. Gallagher: That is satisfactory to your Honor?

The Court: Yes.

Mr. Gallagher: Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court: I do not. I do feel that when you came into court this morning, after your argument was closed, and challenged the plaintiff to re-open the case and introduce certain evidence in the presence of the jury, that you did something in the presence of the jury which, if Mr. Simpson had done, you would have been screaming for mistrial here, and I think you were guilty of misconduct in that proceeding this morning.

Whether it was such I will do anything about it, I will keep under advisement until we have all had opportunity to return to tranquillity.

Wouldn't you have cited that as misconduct if Mr. Simpson had done it? [S18]

Mr. Gallagher: I don't think so. I didn't challenge him——

The Court: Then you would have in that moment a character which no one would impute to you, from their knowledge of you.

Bring in the jury.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: The jury and alternate are now present.

In the course of my instructions I read you a dictionary definition of inference. Disregard the dictionary definition.

I also read you a definition of inference which I did not characterize as a dictionary definition. That was the correct definition of inference.

I am not saying whether the dictionary was correct or incorrect, but you are to regard the one from official instructing language, and in reading from Webster I departed from the official instructing language.

So I will now, in order to avoid any confusion about what an inference is, read to you the instruction of inference which I gave to you earlier and which is the proper one:

“An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a [819] deduction from those facts ‘as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.’”

The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to the cause of action which has been charged there, that is, you are not to go beyond the nature of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that.

Now, I see that I made the same, or engaged in the same conduct with respect to the definition of presumption that I did with respect to inference, so I will look the right one up. It has been read to you before, but so you will know what part of my instruction concerning presumption is the official,

proper one, I will read the proper part to you again, and you are to disregard any other definition of presumption.

"A presumption is a deduction which the law expressly directs to be made from particular facts. It may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption."

If I told you that Mr. Hutchison was acting within the [820] performance of his duties at the time that the incident which resulted in his death took place, that was an inadvertence, for it was my intention to tell you, and I do tell you now that whether or not Mr. Hutchison was working within the scope of his employment at the time of the injury is a question exclusively for you.

I do repeat to you that it makes no difference whether he was on Articles or not on Articles.

The court instructs you also that it is the law that no employer is ever required to keep the premises in which the employees work absolutely 100 per cent accident-proof.

That is not a rule which the law requires of anyone. It doesn't require it of you or any person, that they keep things absolutely accident-proof or up to the very last minute.

Someone was showing me the other day power brakes and pointing out how much more efficient they are on a car than ordinary brakes. I don't know whether they are or not, but there was a time when automobiles had only two-wheel brakes.

Then the four-wheel brake came along, and I

suppose everyone today recognizes that the four-wheel brake is a better brake than the two-wheel.

You don't have to introduce every new thing that is known to science, but you must keep your premises within which employees are required to work, or which they will use [821] in going to or fro from work or in their reasonable access to the place of employment, you must keep those premises reasonably safe. "Reasonably" is the key word.

Now, as to exceptions to the further statement of the court to the jury, after they have returned following the statement of original exceptions, approach the bench, if there are any.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

The Court: You don't have to re-state them all over again, but just what I said, did I say anything wrong?

Mr. Simpson: No exception, your Honor.

Mr. Gallagher: The defendant has no exception to what your Honor has stated here, but does not withdraw the exceptions which it has already stated and is not satisfied with the instructions, as a whole, at this time. [822]

* * * * *

The Court: The jury will now retire to consider its verdict and I request the clerk and the bailiff to arrange to have them taken to lunch as soon as possible, because it is now almost 1:00 o'clock.

* * * * *

Friday, October 14, 1955; 10:23 p.m.

The Court: The jury present; counsel here.

I have a note from the jury.

“Re-read your instructions regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this cannot apply to the second cause of action.”

I can't re-read it, members of the jury, because that was one I didn't read in the first instance. I read most of the instructions from a book of instructions, which has been compiled by a group of judges here.

But the instruction with respect to this matter of failure to conduct a search was extemporized and I will either try that again or have the one I gave you this morning read by the reporter. Which do you prefer, Mr. Foreman, or do you have any preference?

Foreman Eager: I think we would like to have you do it, try it again.

The Court: All right.

The plaintiff claims under that first cause of action, which you will recall is really a cause of action, which if it existed, existed on behalf of Mr. Hutchison who is now deceased. [830]

Plaintiff claims that Mr. Hutchison was injured due to the negligent failure of the defendant to provide a reasonably safe place in which to work. That as a result of that the accident occurred. That Mr. Hutchison then had conscious pain and suffer-

ing, as a result of the injuries which he sustained after the accident had occurred.

Now, the evidence about failure to conduct a search was offered and admitted and should be considered for just this purpose. You have the question.

If you find that there was liability because of the failure to use reasonable care to maintain a reasonably safe place to work, you have the question then of determining what damages should be awarded. Although they would be in favor of this plaintiff, who is a representative of Mr. Hutchison's estate here, really Mr. Hutchison's damage.

Now, if Mr. Hutchison was having conscious pain and suffering you would want to know *for long* a period he had such conscious pain and suffering. And hence, the failure, if there was a failure, to search for him would be proper evidence for you to have in your mind when you consider how long that conscious pain and suffering lasted.

Now, there is the question of whether, under all the circumstances, a reasonably prudent master of a vessel would have had a search made. You will have to determine that if you come to that question. [831]

But it all goes to the problem of how long the man lived and how his pain and suffering could have been palliated or eased if he had been found by a more prompt search than the one which finally led to discovery of the body. That is how the failure to make a search enters into it.

Then there is a question, "Is it necessary that the

jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?"

It is, because the only damage that is claimed, under the first cause of action, is damage for conscious pain and suffering. There is no suit for loss of earning power under that first cause of action. There is no suit for medical expenses, or anything of that kind.

It is just a suit for the recovery of that intangible kind of damage, which results from conscious pain and suffering. And if the man Hutchison lost consciousness immediately and had no conscious pain and suffering, then no matter how much negligence you might find—and I am not saying whether you should find any or whether you shouldn't, that is for you—but regardless of how much pain and suffering there was, it is that pain and suffering that must be appraised, and that pain and suffering only, because there was no other item of damage. The man was injured. He died as a result of the injury, according to the plaintiff's [832] theory, which is for you to determine, whether it has been substantiated by the evidence. And the only thing for which you are asked to assess a money award is for the pain and suffering. That is, for the first, and unless there was conscious pain and suffering there is insufficient to establish the first cause of action.

Then we have a question, "Do interrogatories apply only to the second cause of action and not the first? If so, does it follow that contributory negli-

gence on the part of the deceased should not be considered in the verdict as to the first cause of action?"

I must answer you that contributory negligence is a question which you must have in mind and must deal with as to both causes of action.

The interrogatories, as they have been drafted here, apply to the second cause of action. You should have the same basic question in mind with respect to the first cause of action, meaning the basic question—if you find that a cause of action has been established—as to whether there was contributory negligence and if so to what extent, because even if this seaman did have conscious pain and suffering, and you find that it is possible to determine some amount of money, which would be a proper award of damages for it, if the seaman himself—meaning Mr. Hutchison—had been guilty of contributory negligence, it would be your [833] duty to diminish the amount of damages proportionately to the amount of negligence of Mr. Hutchison which contributed to bringing about the result. And you will have that principle in mind.

But so far as answering the interrogatories is concerned, they are to be answered only as to the second cause of action, in the event that you return a verdict in favor of the plaintiff on the second cause of action.

Now, these causes of action are very different, very distinct. The first one, as I told you at considerable length this morning, is actually a cause of action which has been inherited here by Mrs. Hut-

chison in her representative capacity, because Mr. Hutchison, who was the owner of that cause of action, is dead, but it is a cause of action based upon his pain and suffering, his damages suffered during his lifetime.

The second cause of action is a suit brought by a widow because of what she claims was the negligence of the defendant in having brought about the death of her husband. And that calls upon you, if you find that she has maintained her burden of proof on that, to determine what damage she has suffered; not what anyone else has suffered. Conscious pain and suffering of Mr. Hutchison doesn't enter into it at all, because that is covered by the first cause of action. [834]

The only element of damage which could be awarded under the second cause of action is the loss, if there has been a loss proved, of the expectancy of Mrs. Hutchison to have economic provision made for her by her husband, to be supported by him.

She says, "I have lost the support of my husband because the Linfield Victory did not use reasonable care to provide my husband with a reasonably safe place within which to work, and because of that I claim damages against the operators of the Linfield Victory, the damages being the amount of money, as nearly as it can be prudently calculated, that I would have received from Mr. Hutchison had he continued to live."

And in that regard you bear in mind that I read to you from the life expectancy tables, which show

that Mrs. Hutchison had a life expectancy at the time of her husband's death of 19 years; that that factor should be considered.

Don't just consider that she is going to live 19 years. She might live longer, she might live less. But the history of whatever organization, group of underwriters or health departments, or whoever it was that compiled that standard table of mortality experience, shows that the average life of persons who were the age Mrs. Hutchison was when her husband died is 19 years.

So bear in mind that fact, if you are going to find for her on the second cause of action, and always bear in [835] mind these questions of whether you do or do not find for the plaintiff are questions for you and that I am not telling you to find one way or the other.

Then you have asked that I read you the causes of action. I hope I can find them here among the papers we had this morning. I don't find them readily at hand. Can you hand me up the file?

Here they are. The first cause of action in its charging language, that is, the essence of the complaint reads this way:

"That on or about the 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and the performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other em-

ployees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 [836] lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilator shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances, in and about said ventilator shaft to provide a reasonably safe place in which to work."

Now, you can see from the very language of that, that it is claimed that the damages were suffered because of conscious pain and suffering, and obviously, if a seaman has personal injuries and is treated he would have the expense of treatment, but this man had no expense of treatment because he died before any was given him.

He might, if he had some permanent injury and afterward had to hobble about in a pained and dis-

abled condition, have damages that you award him a sum of money covering the period of his life expectancy; but that didn't happen. [837]

The only thing that you could possibly award on that first cause of action would be the money value, as nearly as you can assess money value, for his conscious pain and suffering.

Now, I return to reading, and I am reading you the gist of the second cause of action, which, after stating that Mrs. Hutchison was the wife of Nathanael Patrick Hutchison, and that she received the usual support that a wife receives from her husband, says:

"That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages" and as a matter of law the only damage for which she could collect.

If you find that the death was caused, as it has been alleged to have been caused, if you find, as a matter of fact, it was so caused, the only damage for which she can collect is her money loss reasonably calculated to be sustained [838] by her by reason of the fact that she has been deprived of contribution to her support by her husband over what-

ever period of time you find, as reasonably prudent jurors, carefully calculating it, she has been deprived of that.

And there is only one lawsuit in which she can collect, that is, she can't come back here next year and say, "I want more." And if she dies tomorrow, and you read about it, if you have returned a verdict, you couldn't come in and take any of it away. You just have to determine what the natural expectancies are and what sum of money can be awarded today on that second cause of action.

All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was" * * * directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

That it negligently did that. That is the type of negligence that is alleged, not any other.

Foreman Eager: Your Honor.

The Court: Yes.

Foreman Eager: Do I understand you correctly by that last remark, that where you have referred to the type of negligence that is alleged in the second cause of action, [839] that the negligence and failure to conduct a search was not alleged in the second cause of action?

The Court: That is true. You see, it couldn't

enter into the second cause of action because, in any event, the woman has lost a husband.

Now, when he died if he did not die because of negligence she has no claim. If he did not die because of the particular kind of negligence charged here she has no claim upon this defendant. But if he did die because of the particular negligence, which has been charged here, then her right accrued the moment he died.

And it wouldn't make any difference whether he was immediately discovered, whether his body was immediately discovered or whether it wasn't. It wouldn't have made any difference if they had seen him fall and had immediately taken him to a hospital, and he had had the best of care and comfort and was given sedatives so that he didn't suffer at all. But, nonetheless, he died.

Her cause of action is based upon the fact that she has lost the support of that husband due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.

And that doesn't include the making of a search for him, but it does include, of course, and is based upon his death under the circumstances which she has claimed brought [840] that death about.

So whether a search was made or not has nothing to do with the second cause of action. It might have something to do with the first cause of action; that is up to you.

Now, you asked something else, one more question here, as I read these:

"Some jurors recall that someone testified that

they had observed screens on the ventilator shafts of other Victory ships. Do you recall any such testimony?"

Well, it is not whether I recall it individually, but whether there was such testimony, and the court, fortunately, has an official recollection which is better than either mine or yours.

I wonder, can counsel indicate the testimony of any particular witness who testified upon this particular subject?

Mr. Simpson: Yes, your Honor. The witness Amundsen so testified.

Mr. Gallagher: I would like to have counsel read it from the deposition as we read it, where he said that he had seen screens on other Victory ships. That was the question. Not other ships, but other Victory ships. I don't think he mentioned Victory ships in that answer. I didn't bring my file.

The Court: The testimony actually should be read from our reporter's notes. But do I take it, Mr. Gallagher, [841] that you are suggesting that for convenience it be read from the deposition?

Mr. Gallagher: Let us look it over together.

The Court: All right.

Mr. Gallagher: Make sure that he is only reading only parts that were read into the record.

Mr. Simpson: May I ask——

Mr. Gallagher: Or have the reporter read it.

Mr. Simpson: May I ask the question be re-read, so there will be no misleading in any way?

The Court: I will pass all of these questions down to the clerk, who will hand them to counsel.

If, with respect to any of the questions, I have not answered them fully or with clarity, if you will indicate wherein I can improve it, I will try to do so, but if you made any such indication, let's do that at the side.

Mr. Simpson: The reason I asked for the question is it says "on the shafts of other" and it is underlined Victory ships.

The particular portion to which I referred, in starting to answer this, to my knowledge there is no testimony that they were seen on other Victory ships.

The Court: It was on other ships?

Mr. Simpson: That is correct.

Mr. Gallagher: I would like to see those questions, too. [842]

The Court: They have been passed to Mr. Gallagher.

The foreman has his hand up.

Foreman Eager: Your Honor, I feel sure that some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with the cause of action, the second cause of action. If you wish, I can tell you why.

The Court: It would be unlawful for you to tell me why. We are a court of law, so we have to live by it.

Foreman Eager: Will you tell us, is it because it was not set forth in the complaint, is that the reason we cannot consider it?

The Court: No. No, that is not the reason. The

reason is that the law just does not allow damages for failure to make the search, that is, it does not allow damages to the widow.

Of course, there might conceivably be some situations in human affairs where there would be such a cause of action, but this is not that kind of a suit.

This is a suit brought by a woman who says, "I was the dependent wife or partially dependent wife of a man who had been killed due to particular negligence of the defendant."

And if she is right in that, then she is entitled to be compensated for her money loss. The law is very hard on all matters. It takes the view that a money loss is what is [843] compensated in courts and money loss is what she suffered.

You will note that I have not said that you could consider the loss of society of the husband. That is not an element on this type of damage. It is the financial loss to the lady.

Mr. Simpson: Your Honor, could counsel approach the bench for just a moment?

The Court: Yes.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Simpson: Your Honor, while I believe this particular foreman is expressing as the question of the jury, what it has in mind is the fact that the plaintiff did incorporate Paragraph IX, failure to search, as part of the second cause of action.

The Court: The foreman can't know that because we didn't read the complaint to them.

Mr. Simpson: I was about to add he doesn't know that was in there, but the reason the plaintiff had included it was because of the idea, among other things, but for the failure to search this man might have been found and there would have been the thought that his life would have been saved. And I believe they are thinking the same way, this would constitute part of the negligence of the pecuniary loss. [844]

The Court: That is a factual question, isn't it, Mr. Gallagher?

Mr. Gallagher: I don't believe so. I think the jury, by the questions, has indicated that it will find for the defendant on the question of the allegation which the plaintiff has made, to the effect that there was a negligent failure to supply sufficient safety appliances in and about the ventilator shaft, to provide a reasonably safe place to work.

What they are trying to do is to find out whether, even with that finding, they could render a verdict in favor of the plaintiff on this failure to search theory.

Now, I say to this your Honor, and I hope I am not offending your Honor this evening: If that is a cause of action it is a separate and distinct cause of action, as to which your Honor would have to submit separate verdicts and split it up into three causes of action, because it would be extremely unfair to permit this jury to render an opaque verdict on that second cause of action for damages, when these questions indicate what they would like to do

is to find out whether, on the death cause of action, they can base it on a failure to search.

Now, the reason, I contend, that your Honor is required under the law to submit that as a separate and distinct verdict form is that unless you do that you can't tell what they found on the specific allegations in Paragraph VIII, [845] and nobody else can.

Now, nobody is asking for anything that is unfair. The defendant doesn't want the court to be partial to the defendant. But the defendant does want the court to do whatever should be done to make the verdict of the jury understandable.

I think your Honor can see what I am talking about. I called that to your Honor's attention the other day. I said that if there are three causes of action you have to have three separate forms of verdict and make them distinct. A verdict labeled "Search cause of action"—

The Court: The Complaint did not start out—that is, if we start with the complaint we don't see three separate causes of action, do we?

Mr. Gallagher: Your Honor, if there is a cause of action which can be predicated upon the failure to search and a failure to find, it is entirely separate and distinct from the cause of action based upon a failure to supply safety appliances, because the injuries were sustained when the man hit the bottom of the trunk, and I think your Honor will recall I cited the case of *Hunt v. The Union Oil Company*, 111 Fed. (2d), to convince your Honor that a cause of action for aggravation of existing

injuries is separate and distinct from the cause of action for the existing injuries; this is the same thing.

The Court: I think cases are abundant on that. [846]

Mr. Gallagher: I think what your Honor ought to do, if you believe that is a factual question, so far as the cause of action for death is concerned, your Honor submit some special interrogatories to them or you should submit another form of verdict to them, and tell them that they have got to find in favor of the defendant on the alleged neglect to supply sufficient safety appliances, if they find the burden of proof has failed in that, so their verdict will not be opaque and unfair and unintelligible.

The Court: Let me read the interrogatories.

I think, Mr. Simpson, you are limited here in your second cause of action.

You say that as a result of said injuries that Nathanael Patrick Hutchison dies. You didn't allege he died because he was not found seasonably.

Mr. Simpson: If you recall, we allege——

The Court: I just had those charging paragraphs excised from it for my convenience here at the bench.

Mr. Simpson: The paragraph which is incorporated by reference as the first paragraph of the second cause of action——

The Court: We will get it. My problem, as I mentioned it there, or the problem, rather, is that the second cause of action says, "said injuries" and

“said injuries” are always referred to as emanating from the inadequacy of [847] the safety devices.

Your Paragraph IX says:

“That defendant and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall,” but it doesn’t then go on and allege there was any damage as a result of that.

It is thrown in, so far as reading the complaint is concerned, as kind of a gratuitous observation that they were a callous employer, but without any drawing of a damage——

Mr. Simpson: Isn’t the fall, your Honor, in the category of the damage, referring to “said injuries”, injuries of the fall?

The Court: I don’t follow you.

Mr. Simpson: If a man falls, as alleged in Paragraph VIII, and we incorporate, when we take up our first paragraph in our second cause of action, that if the fall was part of the injury the very fact that he fell——

The Court: It is not alleged any damages flowed from the failure to find him.

Mr. Simpson: Well, excepting his death, which is alleged, because they refer to “said injuries”.

Our whole reason for incorporating that [848] paragraph in the second cause of action was that we believed that the failure to conduct a search—had it been conducted there might have been a saving of the man’s life, and there would be no cause

of action on the first one, and this was a violation of their duty, the agent, as not only to the safety appliances, within the scope of the Jones Act——

The Court: I don't think you could sustain a judgment on that, not in this state of the pleading. I am sorry, I would like to give that instruction. I don't think the pleadings would warrant it.

Mr. Simpson: My whole point, your Honor, is that I feel, in finding that this widow suffers a pecuniary loss because of his death, they must first find there was negligent conduct on the part of the defendant, and but for that this wouldn't have happened.

The Court: That is right.

Mr. Simpson: We do allege that they did not search. The jury have at least considered that within the framework of the negligence that led to the death.

The Court: You didn't allege there was a bit of aggravation because they didn't find him. You just allege that they didn't search for him.

Mr. Gallagher: Your Honor, may I point out, that under the Federal Rules of Civil Procedure, while it is permissible to say "first cause of action, second cause of action" and [849] so forth, there are cases which hold that if you set forth separate claims in separate paragraphs that is all that is required.

Of course, you have got to allege a fact showing some proximate causal connection between what you do allege and what you do claim.

Assuming, without conceding, there are inferred

facts sufficient to show plaintiff is entitled to relief on the theory that this was a negligent failure to search for him, and that such negligent failure proximately contributed to his death. That would be separate and distinct entirely from the cause of action which is predicated upon the condition of the masthouse appliances.

Therefore, as I have contended and do now contend, if the court submits that theory to the jury, which I don't think the court should, the court must submit separate forms of verdict and have them labeled so we will know what the jury has done. Otherwise, the defendant would be deprived of its property without due process of law, in that there is no finding with reference to that particular alleged cause of action.

Mr. Simpson claims there are three separate causes of action. That is what he claims.

The Court: He hasn't alleged three. I cannot give the instruction that he requests or submit an interrogatory— [850] if I submit an interrogatory on that and the jury returned it, you could appeal on the ground that it is not the cause of action that is pleaded in the amended complaint, and I think you would be sustained on it.

Mr. Gallagher: Well, your Honor said something about these instructions that you have given the jury since they came back.

The defendant excepts to the instructions which your Honor has given to the jury since they came down this evening upon the ground that these instructions given to the jury are argumentative. They

are not confined to the statement of principles of law applicable to the case.

They do not cover the issues which the court purported to state to the jury. The court refers to negligence and so forth and so on, but they are, I think, unfair to the defendant.

The court keeps constantly referring to the fact that this poor widow has lost her husband and she has sustained a monetary loss, and so forth and so on.

Now, I call your Honor's attention—oh, and in reading averments of the complaint, I again request your Honor to tell the jury unequivocally that the averments of the complaint do not constitute facts and do not constitute any evidence in this case.

And this question—— [851]

The Court: Before I forget, I will tell them that.

Mr. Gallagher: ——had not been answered.

(Whereupon, the following proceedings were had in the presence and the hearing of the jury:)

The Court: Members of the jury, I have read a portion of the complaint to you. A complaint is not evidence. It is the allegation. The evidence is what you heard from the witness stand, what you have seen in the exhibits.

The complaint merely states the charge that the plaintiff has made against the defendant. It is the pleading and not the proof.

(Whereupon, the following proceedings were

had in the presence but out of the hearing of the jury:)

Mr. Gallagher: Now, this question reads as follows:

“Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?”

Now, I respectfully submit that that question should be answered categorically. The answer is either yes or no.

The question should be read to the jury and the answer given. I think the only possible answer that you should give to that interrogatory is yes. And they should be instructed to disregard what you have said.

The Court: I will not instruct them to [852] disregard anything I have said. It has all been the law.

(Whereupon, the following proceedings were had in the presence and the hearing of the jury:)

The Court: One of your questions to me reads:

“Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?”

The answer is yes.

Now, members of the jury, have we answered the questions you had in mind?

Foreman Eager: Yes, sir.

The Court: It is after 11:00 o'clock. Do you want to work further on the case tonight or not?

I see some of you nodding affirmatively. We don't want to make you work when you are fatigued.

We will send you to a hotel if you desire. You can resume deliberations——

Foreman Eager: I think we would like to work for a little while.

The Court: All right. You may retire to the jury room to further consider your verdict. But, if, in the course of the deliberations, you come to the point where you wish the court to have you sent to a hotel for the night, bear in mind I will do so as soon as you let me know. [853]

Foreman Eager: If we should make a decision on one cause of action and not the other, would you like to know that tonight or would you like to have us hold that until——

The Court: I think we should have the entire verdict at one time.

Foreman Eager: Thank you.

The Court: Recess until we hear from the jury further.

(Whereupon, at 11:12 p.m. the jury retired to deliberate further.) [854]

October 15, 1955, 12:04 a.m.

The Court: Have you arrived at a verdict?

Foreman Eager: Yes, your Honor.

The Court: Have you signed it?

Foreman Eager: Yes, your Honor.

The Court: Dated it?

Foreman Eager: Yes, your Honor.

The Court: What date did you put on it?

Foreman Eager: Yesterday, the 14th.

The Court: Put today's date on it. That is important. It will make it accurate and also, since you had to work into another day, you are entitled to another day's honorarium for your services here. You can't get it if you back-date the verdict.

You may now read the verdict.

Foreman Eager: Shall I read the interrogatories or the just the verdict.

The Court: Read the verdict and then the interrogatories after the verdict.

Foreman Eager: All of it, your Honor?

The Court: I am sorry, yes. It is the jury's verdict and the jury should speak it.

Foreman Eager: "First Cause of Action"—shall I read the number? [855]

The Court: No, you can just get into the body of it. You don't have to read the title or the number.

Foreman Eager: "(Personal Injuries)

"Upon the first cause of action, we the jury find in favor of the defendant, Pacific-Atlantic Steamship Company, and against the plaintiff, Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased. Signed William H. Eager, Foreman of the Jury. Dated at Los Angeles, California this 15th day of October, 1955.

"Second Cause of Action (Damages for Death) ·

"Upon the second cause of action, we the jury find in favor of the plaintiff, Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased, and against the defendant, Pacific-

Atlantic Steamship Company, and fix plaintiff's damages in the sum of: \$45,000.00. William H. Eager, Foreman of the Jury. Dated this 15th day of October, 1955.

"Interrogatory No. 1: "What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?

\$50,000.00.

"Interrogatory No. 2: [856] "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

"Yes.

"Interrogatory No. 3: "If your answer to Interrogatory No. 2 is 'yes', state the extent in percentage that the negligence of Nathanael Patrick Hutchison proximately contributed to his death.

"Ten per cent.

"B Translate the percentage into dollars as a percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?

"5,000.00.

"Interrogatory No. 4: "Subject the amount of money stated by you in answer to Interrogatory No. 3 B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?

"\$45,000.00.

"The handwritten portion of the foregoing constitute answers made by the jury to the typewritten portion which are interrogatories submitted to the jury for its answers. [857]

“Dated: October 15th, 1955. Signed William H. Eager,

Foreman of the Jury.”

The Court: Thank you. Will you hand those verdicts to the bailiff, who will give them to the clerk.

The clerk will call the roll of the jury. Will one overall poll be sufficient, or do you wish a poll as to each verdict and each interrogatory?

Mr. Gallagher: I think one will be sufficient.

The Court: All right. One poll.

These will be the last questions we will ask you.

The Clerk: Mr. Metzler, is this your verdict as presented and read?

Juror Metzler: It is.

The Clerk: Mrs. Korengold, is this your verdict as presented and read?

Juror Korengold: It is.

The Clerk: Mr. Eager, is this your verdict as presented and read?

Foreman Eager: It is.

The Clerk: Mr. Clark, is this your verdict as presented and read?

Juror Clark: It is.

The Clerk: Mrs. Sealfon, is this your verdict as presented and read?

Juror Sealfon: It is. [858]

The Clerk: Miss Jeffreys, is this your verdict as presented and read?

Juror Jeffreys: It is.

The Clerk: Mrs. Booth, is this your verdict as presented and read?

Juror Booth: It is.

The Clerk: Mr. Duber, is this your verdict as presented and read?

Juror Duber: It is.

The Clerk: Mrs. Bannister, is this your verdict as presented and read?

Juror Bannister: It is.

The Clerk: Mrs. De Young, is this your verdict as presented and read?

Juror De Young: It is.

The Clerk: Mrs. Schindler, is this your verdict as presented and read?

Juror Schindler: It is.

The Clerk: Mr. Curran, is this your verdict as presented and read?

Juror Curran: It is.

The Court: Enter the verdicts, and enter judgment upon the verdicts.

* * * * *

[Endorsed]: Filed February 27, 1956.

[Endorsed]: No. 15091. United States Court of Appeals for the Ninth Circuit. Pacific-Atlantic Steamship Company, a corporation, Appellant, vs. Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 9, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15091

PACIFIC-ATLANTIC STEAMSHIP COM-
PANY, a corporation, Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, de-
ceased, Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY

1. The court erred in denying defendant's written motion to strike the matter contained in Paragraph IX of the First Amended Complaint; said written motion having been filed in October, 1952; and erred in denying defendant's oral motions, during the course of the last trial, to strike said matter.

2. The court erred in denying defendant's motion for a directed verdict with respect to the matter set forth in Paragraph IX "That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to-wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the Port of Philadelphia, State of Pennsylvania."

3. The court erred in permitting the plaintiff to

introduce irrelevant, immaterial, impertinent, and passion and prejudice arousing evidence upon the subject of defendant's failure to search for and discover Hutchison at the bottom of said ventilating shaft in an injured condition prior to his death.

4. The court erred in denying defendant's oral motions to withdraw the subject of defendant's failure to search for and discover Nathanael P. Hutchison in an injured condition and prior to his death from the consideration of the jury.

5. The court erred in denying defendant's motion for a directed verdict, at the close of the evidence offered by the plaintiff, with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

6. The court erred in each and every ruling, order, decision or action adverse to the defendant, appearing within and shown by the matters and things included within defendant's designation of the record on appeal; and in this respect, defendant will contend on appeal that none of said rulings, orders, decisions or actions was invited, encouraged, or waived or consented to at any time or in any manner whatsoever or at all, by reason of any act or omission of defendant.

7. The court erred in denying defendant's motion, at the close of all of the evidence, for a directed verdict in favor of defendant with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

8. The court erred in denying defendant's mo-

tion for judgment notwithstanding the verdict with respect to the claim designated in the first amended complaint as the "Second Cause of Action"; and in its ruling denying defendant's alternative motion for a new trial with respect thereto; and there was an abuse of judicial discretion in the ruling of the court with respect to said alternative motion for a new trial.

9. The court erred in refusing to give to the defendant reasonable time and opportunity to assign as error the giving and the failure to give instructions in that defendant's attorney was arbitrarily denied a reasonably sufficient time and opportunity to state distinctly the matter to which the defendant objected and the grounds of its objections.

10. The evidence is insufficient to support the finding of the jury that at the time Nathanael P. Hutchison suffered the personal injuries from which he died the said Hutchison was acting or engaged in the course of his employment.

11. The evidence is insufficient to support a finding that there was an insufficiency in the appliances in and about the ventilator shaft referred to in Paragraph VIII of the first amended complaint or that, in this respect, there was a failure on the part of the defendant to provide a reasonably safe place in which to work.

12. The evidence is insufficient to support a finding that there was an insufficiency, due to defendant's negligence, in its safety appliances in and

about the ventilator shaft or that, in this respect, there was a negligent failure on the part of the defendant to provide a reasonably safe place in which to work.

13. The evidence is insufficient to support findings in favor of the plaintiff with respect to the issues of material fact raised by those averments set forth in Paragraphs VII, VIII and/or IX of the claim designated in the first amended complaint as "First Cause of Action" and incorporated by reference thereto in the "Second Cause of Action" and the averments of Paragraph II of said "Second Cause of Action" which are denied in defendant's answer.

14. The evidence is insufficient to support a finding that Nathanael P. Hutchison fell into or was precipitated to the bottom of said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support a finding that said ventilator shaft was an open ventilator shaft.

16. The evidence fails to show actionable negligence on the part of defendant as averred in the first amended complaint.

17. The jury erroneously failed to find that negligence on the part of Nathanael P. Hutchison was the sole proximate cause of his death.

18. The evidence is insufficient to support the finding of the jury that negligence on the part of Nathanael P. Hutchison did not proximately con-

tribute to his death to any extent or proportion in excess of 10 percent of the total proximate cause of said death.

19. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of Fifty Thousand Dollars (\$50,000.00).

20. There was irregularity in the proceedings, acts and conduct of the court, jury and plaintiff's trial attorney; and orders of the court and abuse of judicial discretion, by which the defendant was prevented from having a fair trial.

21. Excessive damages were awarded under the influence of passion and prejudice and arbitrary conduct upon the part of the jury.

22. The court erred in admitting into evidence the testimony of Amundsen with respect to screens over the top of ventilator shafts on other ships, horizontal bars precluding entry into the access shaft adjacent to said ventilator shaft on other ships; that he had never seen on any other ship a ventilator shaft without a ladder therein; and those portions of the testimony of Castle that there was no protective screen over the top of the ventilator shaft and that with the door to the masthouse closed it was quite dark inside said masthouse; and the testimony of John Hutchison (brother of the deceased) that with the masthouse door closed there was absolute darkness inside said masthouse; and the testimony and conclusions of Crawford with respect to the subjects of custom or practice, and thorough illumination of all areas of

work; and with respect to heavy vertical screens in place of the pipe railings; that the ventilator shaft was a dangerous area; and that said ventilator shaft was adjacent to an area of access.

23. The court erred in refusing to grant defendant's motions, and each thereof, to strike testimony and other evidence with respect to the issue of actionable negligence upon the grounds stated in such motions, and each thereof, and in accordance with such motions, and each thereof.

24. The court erred in instructing the jury as it did and in failing to instruct the jury in a distinct, concise, direct and impartial manner with respect to the law applicable to the issues of material fact raised by those averments of the first amended complaint which were denied by defendant in its answer thereto; and with respect to defendant's special defense premised upon negligence on the part of Nathanael P. Hutchison proximately causing or proximately contributing to his injury or death.

25. The court erred in refusing to instruct the jury upon the essential elements of actionable negligence on the part of defendant in connection with and as limited by the averments of the first amended complaint with respect to the claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of mast-house No. 2 to provide a reasonably safe place in which to work; and in the failure and refusal of the court to restrict and confine the possibility of a

verdict against the defendant exclusively to said specific and only claim of alleged negligence on the part of defendant.

26. The court erred in failing and refusing in the instructions given to the jury to fairly, distinctly and accurately state and define the issues of material fact raised by those averments of the first amended complaint denied in the answer of the defendant, or to confine the fact finding power of the jury thereto.

27. The instructions as a whole are misleading, contradictory, confusing, inaccurate, incomplete and lack distinctness. The instructions as a whole contain indiscriminate, improper, extraneous and erroneous statements and comments by the trial judge.

28. The instructions as a whole contain inaccurate, irrelevant and improper interpolations by the trial judge having no legitimate bases in the law applicable to the issues or evidence and not necessary for the proper guidance of the jury in its deliberations.

29. There was an erroneous failure of the court in the instructions given to the jury of its own motion to fairly or completely or at all to state or define the issues of material fact raised by the averments of the first amended complaint and the denials thereof in defendant's answer thereto; an erroneous failure of the court to instruct the jury with respect to the sole statutory basis of possible liability on the part of the defendant as to plain-

tiff's claim for damages by reason of the death of Nathanael P. Hutchison; an erroneous failure of the court to instruct the jury with respect to the essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; an erroneous failure of the court to properly instruct with respect to the burden of proof imposed upon the plaintiff and defendant or to fully instruct thereon; an erroneous refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael P. Hutchison with respect to the subjects of actionable negligence on the part of the defendant, contributory negligence on the part of Nathanael P. Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; the instructions given to the jury by the court of its own motion are indistinct, incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to legal liability imposed by the Jones Act, the issues of material fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the instructions given by the court of its own motion contain much matter and improper comment which is completely extraneous to proper statements of law which can be given

to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions interpolated and made improper, unfair and inaccurate comments with respect to the effect and weight of evidence; the elements of actionable negligence on the part of defendant; contributory negligence on the part of Nathanael P. Hutchison; the subject of damages and other matters; the court improperly instructed and commented with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover applicable principles of law contained in the following instructions proposed by the defendant and delivered to the court on or before October 12, 1955: Numbers 1, 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38, 39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65, and 66.

30. The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory No. 3, which reads as follows: "On what date and at what time on said date did

Nathanael P. Hutchison come in contact with the bottom of the ventilator shaft?"

Dated: April 9, 1956.

/s/ LASHER B. GALLAGHER,
Attorney for Appellant Pacific-Atlantic Steamship
Co., a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 9, 1956. Paul P. O'Brien,
Clerk.

No. 15,091

United States Court of Appeals
For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a
corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison,
deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 15,091

United States Court of Appeals For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a
corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison,
deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENT.

The original complaint in this action was filed on October 15, 1951. The averments of paragraphs III, IV, VII, VIII, IX and X of the first count and the averments of paragraphs I and II of the second count are, for the purposes of this jurisdictional statement, the same as the averments of the same numbered paragraphs in the first amended complaint filed October 2, 1952.

The first count is purportedly based upon the provisions of Title 45, United States Code, § 59. The second count is purportedly based upon that portion of Title 46, United States Code, § 688, which provides, in substance, that "in case of the death of any seaman as a result of a [personal injury suffered in the course of a seaman's employment]

the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in *such* action *all* statutes of the United States conferring or regulating the right of action for death in the case of railway employees *shall* be applicable."

Title 45, United States Code, § 51, provides that every common carrier by railroad while engaging in interstate or foreign commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative, for the benefit of the surviving widow, for such death resulting in whole or in part by reason of any insufficiency, due to its negligence, in its appliances. The remaining bases of possible liability are ignored because the complaint specifies "That said injuries were directly caused by reason of the negligence of said defendant *in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place to work*" (T.R. p. 6) and that as a result of said injuries, Hutchison died at some time between the 24th day of April, 1951 and the 30th day of April, 1951.

It is obvious that the words "by railroad" must be deleted from the statute and the words "by water" inserted in lieu thereof. Otherwise, § 51 of Title 45, United States Code, would not be applicable to the death of a seaman by reason of personal injury suffered upon navigable waters. This is an elementary rule of statutory construction and requires no citation of authority.

The complaint fails to state a claim showing that the pleader is entitled to relief or that the District Court of the United States was vested with jurisdiction of the subject matter for the following reasons:

1. There is no averment that at the time of the sustaining of personal injury by Hutchison the defendant was a common carrier by water and was engaged in interstate or foreign commerce.

2. There is no averment that at the time Hutchison suffered the injuries from which he died he was employed by a common carrier in such commerce.

The averment in paragraph IV that the steamship "Linfield Victory" was used "for transportation of freight for hire by water in interstate commerce and coastwise trade" (T.R. p. 4) is insufficient and fatally defective. The appellant could have used the vessel as a "contract carrier" or "private carrier" of freight for hire by water in interstate commerce; but such activities are not sufficient to show that the defendant was a common carrier by water, or otherwise.

In an action premised upon the provisions of the *Federal Employers' Liability Act*, a complaint does not state a cause of action unless there is an allegation that the instrumentality involved was being used in interstate commerce at the time of the happening of the accident; and that the defendant and the plaintiff were at said time, respectively, engaging in interstate commerce and employed in such commerce; and that the defendant was a common carrier. (*Shade v. Northern Pacific Ry. Co.* (D.C. Wash.), 206 Fed. 353; *Hogarty v. Philadelphia, etc. Ry. Co.*, 99 A. 741, 255 Pa. St. 236; *Wrenn v. Seaboard Air Line Ry. Co.*, 86 S.E. 964, 170 N.C. 128, 36 S. Ct. 567, 241 U.S. 290, 60 L.ed. 1006; *Harlan v. Wabash Ry. Co.*, 73 S.W. 2d 749, 335 Mo. 414; *Grand Trunk Western Ry. Co. v. Lindsay*, 34 S. Ct. 581, 233 U.S. 42, 58 L.ed. 838; *Brinkmeier v. Missouri Pac. R. Co.*, 32 S. Ct. 412, 224 U.S. 268, 56 L.ed. 758; *Farmer's Bank & Trust Co. v. Atchison, T. & S. F. Ry. Co.*, 11 F.2d 993; *Frazier v.*

Hines, 260 F. 876; *Southern Ry. Co. v. Howerdon*, 106 N.E. 369, 182 Ind. 208; *Davis v. Chicago & E. I. Ry. Co.*, 94 S.W. 2d 370, 338 Mo. 1248; *Illinois Cent. R. Co. v. Kelly*, 181 S.W. 375, 167 Ky. 745; *St. Louis, etc., R. Co. v. Hesterly*, 135 S.W. 874, 98 Ark. 240, reversed on other grounds, 33 S.Ct. 703, 228 U.S. 702, 57 L.ed. 1031; *Walton v. Southern R. Co.*, 179 F. 175; and *Genzel v. New York, Chicago & St. Louis R. Co.*, 249 Ill. App. 164.)

Therefore, the District Court of the United States was without jurisdiction to do anything excepting to dismiss the action or to enter a judgment in favor of the appellant upon the ground that there was no averment or proof of the essential requisites that the appellant be a common carrier by water, engaging in interstate or foreign commerce, and that Hutchinson suffered personal injury while he was employed "by such carrier in such commerce" and died as a result thereof. This Honorable Court was likewise without jurisdiction to do anything in respect of the appeal prosecuted by Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, as a result of the judgment entered in favor of the Pacific-Atlantic Steamship Company on October 31, 1952 (T.R. pp. 16-17) excepting to affirm the same; because the lower court was without jurisdiction to do anything excepting to enter judgment in favor of Pacific-Atlantic Steamship Company.

It is also the rule that in determining whether a complaint presents a substantial *Federal* question within the jurisdiction of a Federal Court, the allegations of the complaint and not the facts developed or the decision on the merits, control. (*Mosher v. City of Phoenix*, 53 S.Ct. 67, 287 U.S. 29, 77 L.ed. 148; *Filhiol v. Torney*, 24 S.Ct. 698, 194 U.S. 356, 48 L.ed. 1014; *Moore v. Chesapeake & O. R. Co.*, 54 S.Ct. 402, 291 U.S. 205, 78 L.ed. 755;

Chaskin v. Thompson, 143 F.2d 566; *Connolly v. First National Bank—Detroit*, 86 F.2d 683, cert. den., 57 S.Ct. 795, 301 U.S. 692, 31 L.ed. 1348; *McNutt v. General Motors Acc. Corp.*, 57 S.Ct. 780, 298 U.S. 178, 80 L.ed. 1135; *Atlantic Coast Line R. Co. v. Reaves*, 208 F. 141, 125 C.C.A. 590; *Troxell v. Delaware, L. & W. R. Co.*, 183 F. 373, cert. den., 31 S.Ct. 469, 219 U.S. 584, 55 L.ed. 346; *Clark v. Southern Pac. Co.*, 175 F. 122.)

After the rendition of the verdict of the jury in favor of appellant in respect of the "first cause of action" on the last trial (T.R. pp. 82-83) judgment was docketed "in favor of the defendant as to the first cause of action and against the plaintiff" on October 18, 1955. Whether the trial court was vested with jurisdiction of the subject matter was a question of law. The rendition and docketing of the judgment in favor of the defendant as to the first cause of action is supported, as a matter of law, and is the *only* judgment which *could* have been rendered, because of the absence of any averment in respect of the matters and things hereinabove set forth, or of any evidence showing or from which it could be found that the Pacific-Atlantic Steamship Company used the steamship "Linfield Victory" for transportation of freight for hire by water in interstate commerce and coastwise trade or that the injuries were suffered by Hutchison at a time when appellant was a common carrier by water or was engaging in interstate or foreign commerce or that Hutchison suffered the injuries from which he died while he was employed by the appellant in such interstate or foreign commerce.

The complaint is also defective, in so far as jurisdictional requisites are concerned in that there is a failure to aver that Hutchison was a member of the crew of the steamship "Linfield Victory" on April 24, 1951. (*Norton v. Warner Co.*, 64 S.Ct. 747, 321 U.S. 565, 88 L.ed. 931;

South Chicago Coal & Dock Co. v. Bassett, 60 S.Ct. 544, 309 U.S. 251, 84 L.ed. 732; *DeMartino v. Bethlehem Steel Co.*, 164 F.2d 177; *Bowen v. Shamrock Towing Co.*, 139 F.2d 674; *Hawn v. American S.S. Co.*, 107 F.2d 999; *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991; *McKie v. Diamond Marine Co.*, 204 F.2d 132; *Wilkes v. Mississippi River Sand & Gravel Co.*, 204 F.2d 383; and *Gahagan Const. Corp. v. Armao*, 165 F.2d 301.)

The judgment entered in favor of appellant on October 31, 1952 is, therefore, res judicata for the reason that this Honorable Court was without jurisdiction to reverse said judgment because the District Court of the United States was without jurisdiction to do anything excepting to enter and docket said judgment in favor of defendant-appellant. The last judgment entered in favor of defendant-appellant on the "first cause of action" is res judicata in respect of the element of a lack of jurisdiction of the subject matter. No appeal has been taken by Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, with respect to the judgment entered in favor of defendant-appellant on the "first cause of action". Said judgment was filed, entered and docketed October 18, 1955. (T.R. pp. 85-86.)

Therefore this Honorable Court, while vested with appellate jurisdiction pursuant to Title 28, United States Code, § 1291, should reverse the judgment and remand the case to the District Court of the United States with directions to dismiss the same because of the lack of jurisdiction in respect of the subject matter.

II.

STATEMENT OF THE CASE.

The evidence, including that which was admitted over objection of appellant, is set forth, mainly in narrative form, as follows:

The steamship "Linfield Victory" was owned by the United States of America, Department of Commerce, Maritime Administration, in 1951. It was bare-boat chartered to Pacific-Atlantic Steamship Company, including the period of the month of April, 1951. It was in the course of an intercoastal voyage when it was in Baltimore, Maryland, in the month of April, 1951. (R.T. p. 477; T.R. p. 310.)

Defendant's Exhibit "B" is the bare-boat charter pursuant to which defendant-appellant was in possession of the steamship "Linfield Victory" during the month of April, 1951. (R.T. p. 347; T.R. p. 281.) Clauses 1 and 11, respectively, part II, of the charter provide as follows: "*Condition of the Vessels on Delivery.* The vessel on her delivery shall be in *Class A-1 American Bureau of Shipping* or equivalent, with all required certificates, including but not limited to marine inspection certificates of the Coast Guard, Treasury Department, and so far as due diligence can make her so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped, and in every respect seaworthy and in good running condition and repair, with clean swept holds and in all respects fit for service. *Structural Changes.* The Charterer shall make no structural changes in the Vessel and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the written approval of the Owner."

Pacific-Atlantic Steamship Company had "operated" 36 or 37 Victory type vessels besides six purchased outright. Five or six of the 36 or 37 were operated under bare-boat charter; and the others were operated by Pacific-Atlantic Steamship Company for the government under a general agency agreement. (R.T. pp. 482-483; T.R. pp. 314-315.)

In the course of the inspections made by Coast Guard inspectors they go into all cargo spaces and masts-houses. (R.T. pp. 483-484; T.R. pp. 315-316.)

With reference to the Victory ships other than the "Linfield Victory", that were owned by defendant-appellant or which it had operated under bare-boat charters or as general agent for the United States of America, each and every one of those ships was inspected and a regular certificate of inspection issued for each one of them by the Coast Guard. They were inspected at times throughout the United States. There would be many different inspectors who inspected and passed these vessels. Wherever the certificate expires, the first American port, the vessel has to be inspected. (R.T. pp. 496-497; T.R. p. 326.)

As a part of the Coast Guard rules and regulations there is a yearly inspection, conducted by the Coast Guard, of steam cargo vessels. According to those regulations no steam vessel may be navigated or used as a cargo vessel on navigable waters of the United States without a certificate of inspection having been issued by the Coast Guard. Those certificates of inspection are standard. (R.T. p. 217; T.R. p. 236.)

Defendant's Exhibit "A" has reference to the "Linfield Victory", owned by the United States of America, Department of Commerce, and is a photostat of the standard certificate of inspection issued by the Coast Guard. The expiration date, July 17, 1951, means it was issued about a year before that. It is what is called a regular certificate of inspection. (R.T. pp. 219-220; T.R. pp. 238-239.)

Title 46 U.S.C., § 363, 41 Stat. 305, 49 Stat. 2016, 64 Stat. 1277, provides that all steam vessels owned or operated by the Department of Commerce shall be subject

to all the provisions of title 52 of the Revised Statutes for the regulation of steam vessels and Acts amendatory thereof or supplemental thereto.

Title 46 U.S.C., § 391, 60 Stat. 1097, provides that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each steam vessel and shall satisfy itself that the vessel is in a condition to warrant a belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law are faithfully complied with.

Title 46 U.S.C., § 399, 60 Stat. 1097, provides that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, and that no vessel required to be inspected shall be navigated without having on board an unexpired regular certificate of inspection.

The intercoastal shipping articles are Defendant's Exhibit "C". (R.T. p. 507; T.R. p. 332.) Hutchison did not execute these intercoastal shipping articles.

When seamen are not on articles they can quit any time they want to. On an intercoastal voyage a man wouldn't be put on articles until prior to sailing from Philadelphia, Pennsylvania, for the canal, for the reason that if he was an unsatisfactory employee defendant-appellant could get rid of him without any trouble and if he did not like it he could quit at any time. In the meantime, until one side or other became dissatisfied, he would work. (R.T. pp. 492-495; T.R. pp. 324-325.)

Defendant's Exhibits "D" and "E" are, respectively, a requisition, inter alia, for four additional portable cargo lights and a receipt showing the delivery of said portable cargo lights to the vessel before the commencement of

the voyage, so that there were 26 on board. (R.T. pp. 481-482; T.R. pp. 313-314.) The object which appears in the lower right-hand corner of the space just inside the open locker door, Plaintiff's Exhibit 4, a photograph, is a portable cargo light. The object immediately below the arrow, identified as "E.O." on Plaintiff's Exhibit 7, a photograph, is an outlet for an electric current for plugging in such lights. In the event it is dark any place in a hold or in a masthouse a cargo light can be used for the purpose of supplying artificial illumination; and that is their purpose. It is the right of any member of the crew to take such a light and use it in case he desired to do so. Defendant-appellant had no restrictions on the use of these lights by the crew. (R.T. pp. 479-480; T.R. pp. 312-313.) On April 24, 1951, there was no *permanent* electrical installation of any kind *inside* the port compartment of masthouse No. 2. (R.T. pp. 331-333; T.R. pp. 268-270.)

Plaintiff's Exhibits 1 to 11, inclusive, are photographs taken in Portland, Oregon, on May 10, 1952. (R.T. pp. 130-131; T.R. pp. 168-169.) The photographer who took these photographs for plaintiff-appellee, in the presence of George E. Wise, Esq., one of her attorneys, had a camera, a bright light and his own equipment. When he took Plaintiff's Exhibit No. 3, the photographer had his floodlight run on a ladder, which was inside of the masthouse. When the photographer took Plaintiff's Exhibit 1, which shows Mr. Wise standing on the ladder in the access shaft, he used the same floodlight. (R.T. pp. 131-133; T.R. pp. 168-171.)

Although May 10, 1952 was "a clear day" it is obvious from an inspection of Plaintiff's Exhibits 7, 8 and 11 that the sun was *not* shining because of the utter absence of *any* shadows. If the sun was shining, shadows would

have been cast by the booms, ropes, chains, masthouse and ventilator cowls, etc.

This photographic evidence shows that at the time the pictures were taken hatch No. 2 and hatch No. 3 were completely closed and covered with tarpaulins so that no natural light could have gotten into the access shaft through the door leading from the shelter deck or any other deck below the main deck of the vessel, or through the screen at the bottom of the ventilator shaft. The importance of this, with respect to the degree of light then existing, will be demonstrated later in the testimony of plaintiff-appellee's witness Amundsen who stated that on April 24, 1951, he *saw N. P. Hutchison go into the access shaft through a door leading thereto from a lower deck and saw him walk up the access shaft ladder.*

These photographs show a ventilator cowl located on the top of the port compartment of the masthouse referred to in the testimony; and that the upper opening of the ventilator cowl is in the vertical plane and is equipped with a mesh screen.

Plaintiff's Exhibit No. 6, a photograph, shows a screen in the horizontal plane located in the roof of the port compartment of masthouse No. 2, *overhead of the ventilator shaft.* (R.T. p. 168; T.R. p. 196.)

The upper outside opening of the cowl ventilator is about 72 inches in diameter; and the lower opening, which is at the roof of the masthouse, is approximately 36 inches in diameter. The screen on the outer opening of the ventilator cowl is shown in Plaintiff's Exhibits 7 and 8. There is another screen at the butt or lower end of the ventilator shaft (cowl), as it meets the roof of the masthouse. That is the screen shown in Plaintiff's Exhibit 6. The inside of this ventilator cowl is hollow, it looks like a tube; so that there is *no obstruction to air*

or *anything else*, (e.g. light), excepting the two screens. (R.T. pp. 221-222; T.R. pp. 240-241.)

Plaintiff's Exhibit No. 5 (R.T. p. 109; T.R. p. 161), is a photograph taken from a considerable distance aft of masthouse No. 2. It shows that the starboard half of the masthouse has only one compartment but that there are two compartments in the port half thereof, with a door to each. Just to the center of the aft bulkhead the electrical outlet, hereinabove referred to and designated as "E.O." can be seen. No electric cord is plugged into this outlet, and there is no electric cord leading through the door to the starboard compartment. Nevertheless, the camera picked up, from this considerable distance, a portion of a life-ring and the photograph shows part of the printing on this ring consisting of the following: "TLAND—ORE". The home port of the vessel was Portland, Oregon. The door leading into the port compartment of masthouse No. 2 is the last one on the left. In the background, even from a considerable distance, the camera picked up a vertical structural member located at the extreme forward end of the inside of said compartment.

Plaintiff's Exhibits 9 and 10, respectively (R.T. p. 112; T.R. p. 164), show that the ventilator shaft is not as deep as the access shaft. The photograph (Plaintiff's Exhibit 9) looking down the access shaft shows a platform evidently at the same level as the shelter deck level and a rectangular opening in the starboard side of the shaft which is apparently the doorway from the shaft to one of the lower deck levels in a hold; and that the ladder proceeds down, through a hole in this plate, to lower deck levels.

The photographs of the inside of the port compartment of masthouse No. 2 show that a substantial part of the starboard section thereof consists of a deck running fore

and aft, at the same level as the main deck immediately outside.

The access *doorway* to the port compartment of masthouse No. 2 is *54 inches high and 21 inches wide*. (R.T. p. 159; T.R. p. 188.)

Appellant contends that, considering the relatively small cubic area inside the said compartment, the court should take judicial notice of the natural law of physics with respect to the luminous energy of light and hold that it was adequately illuminated by means of the natural light (on a clear, sunny day) which would as a certainty enter the masthouse if the door was open; and there is no evidence showing that the door was closed at any time on April 24, 1951 after it was opened at 8:00 a.m.

The deck (fore and aft) alongside the hatch (access shaft) shown in Plaintiff's Exhibit No. 7, is the same level as the main deck. (R.T. pp. 173-174; T.R. pp. 199-200.)

Plaintiff's Exhibit No. 12 (R.T. p. 144; T.R. p. 179) is a diagram of the inside of the port compartment of masthouse No. 2. This shows, by resorting to the scale thereon, that the upper perimeter of the pipe railing is 42½ inches above the deck level and that the lower pipe railing is at about midway between the deck level and the upper railing. This is also apparent from the photographs.

N. P. Hutchison was 66 inches in height and weighed about 165 pounds. (R.T. p. 257; T.R. p. 256.) If there is added an additional inch for shoes, the top of his head would be 67 inches above the deck level if he stood erect. Thus, in such position, approximately two-thirds of his body would be *below* the top of the top railing. The photographic evidence shows that the highest step of the access shaft ladder is approximately six inches below the

deck level. If he had one or both feet on the top step of the ladder $48\frac{1}{2}$ inches of his body would be below the upper perimeter of the top railing. He was only $5\frac{1}{2}$ feet tall and considerably overweight for that height at 165 pounds. Thus the center of gravity of his body would be considerably below that part thereof which would be at the level of the top pipe railing regardless of whether he was on the deck level or on the top step of the ladder.

It was stipulated, with respect to Plaintiff's Exhibits Nos. 7 and 8, that the black covering material is the tarpaulin which is stretched over the top of the hatch coverings; that when the tarpaulin and the hatch covers themselves are removed, there is an opening in the deck as wide and long as the picture shows the hatch to be; and that there is a vertical steel ladder, straight up and down, attached to the inside of the aft part of the hatch coaming in hatch No. 3; the upper end of said ladder being bolted or welded to the inside of the hatch coaming below the upper portion. (R.T. pp. 177-179; T.R. pp. 203-204.)

It was also stipulated that when plaintiff's witness Kalnin referred, in his deposition, to the aft end of hatch No. 3 being uncovered, he was referring to the after portion of it, the part toward the rear end of the ship. (R.T. pp. 179-180; T.R. pp. 205-206.)

The oral testimony offered by plaintiff-appellee, with respect to the subject of liability, consisted of the depositions of the witnesses Amundsen, Kalnin, (both of whom were members of the crew and on board the ship on April 24, 1951) and Castle, son-in-law of the plaintiff, who went aboard the ship in the latter part of May, 1951, in San Francisco; testimony of John Hutchison, a brother of the deceased; the personal appearance testimony of

George E. Wise, Esq., one of plaintiff's attorneys; and Crawford, a retired master mariner and operator of a nautical school.

The substance of the testimony of these witnesses is as follows:

1. Amundsen's deposition was taken on July 18, 1952, more than a year and two months subsequent to April 24, 1951. (T.R. p. 42; T.R. p. 129.) (All of his testimony with reference to the use of a ladder refers to the ladder in the access shaft located in the after port quarter of the port compartment of masthouse No. 2.)

I have been going to sea 22 years as an A.B. I served on the "Linfield Victory" almost six months. (R.T. p. 66; T.R. p. 130.) I first met Scotty (Hutchison) at the port of Baltimore. We was working together on board the ship. He was the maintenance man but did more or less the same work as I did. "Q. Now, while you and Scotty (Hutchison) were on the ship can you recall any occasion when you were both working in the hold together? A. Well, you mean when we were down cleaning holds? Q. Yes. A. Well, we started on—well, like every day we were working together. Q. I see. A. And—well, I don't know—that special morning we were down there like any other day. The boatswain turned us to at 8:00 o'clock, and we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time. Q. *Do you remember what hold it was?* A. No. (number) 2. Q. And you were down in the hold? A. Yes. Q. Was Scotty with you? A. Yes, sir. Q. From 8:00 o'clock in the morning? A. Yes." Well, then we worked, and so the boatswain come and knocked us off about 10:00 o'clock, "Come up for coffee". We came up the access ladder there on the masthouse. That access ladder was located on the port side with respect to the hold I

was working in. It (the door) was on the port side of the hold in the *after* part of No. 2 hold. When we came up for coffee time we used that access ladder. We come up the same way as we went down at 8:00 o'clock in the morning, through the access or masthouse ladder. (R.T. pp. 67-70; T.R. pp. 131-134.) We went in and had coffee and went into Scotty's forecandle. While we were in his forecandle I had an opportunity to observe his condition as to sobriety. He was sober. I was sober that morning; I didn't even go ashore. After we finished coffee the bos'n said, "Let's go"; so we went back the *same ladder we came up*. We started working again cleaning holds, sweeping and picking up papers; we were working there and Scotty said, "I'm going up on deck and get a drink". I *saw* him *walk up*; I *saw* him *go out the door and walk up the ladder*, and so we worked there. We went up for lunch. That was about *around* eleven. The bos'n came in and knocked us off, so we went up on deck the *same* way. We walk up the same, *up and down all morning*. I went back down in the hold to work after dinner. Scotty was not with me. The last time I saw Scotty was *around* 11:00 o'clock, *or something like that*. When he came back down into the hold with me after coffee time, that was at 10:30. It was some time later, but before lunch, that Scotty went back up. The route he took was the same way, through the door; and that is the last time I saw him. I may have next seen him up in the dining room, I'm not sure. The next time I saw him he was at the bottom of the ventilator shaft up in Philadelphia about five days later. The ladder shown in Plaintiff's Exhibit No. 1 is the ladder we were talking about. (R.T. pp. 70-75; T.R. pp. 134-138.) Masthouse No. 2 looked like Plaintiff's Exhibit No. 2. That (Plaintiff's Exhibit 2) is an accurate reproduction of the top of the ladder at masthouse No. 2. (R.T. pp. 82-83; T.R. pp. 138-139.)

(Note: All testimony of Amundsen with respect to what he had seen on other ships was subject to objection upon the grounds, *inter alia*, that it was irrelevant and that no proper foundation had been laid showing that what he had observed on other ships was under substantially similar conditions.)

I have been on other ships that have access ladders in the masthouse. And on other ships the bars (guard rails) go right across here (referring to the starboard edge of the access shaft). (R.T. pp. 84-85; T.R. pp. 139-140.) There was no ladder in the ventilator shaft. (R.T. p. 87; T.R. p. 142.) The arrangement shown in this photograph (Plaintiff's Exhibit No. 2; R.T. p. 85; T.R. p. 140) was different from the arrangement that I have noticed on other ships I have served on. I mean the bars. The arrangement on the "Linfield Victory" was different from the arrangement that I am familiar with on other ships in that other ships got screens down here, and stuff like that, over the ventilator opening. I have never seen on other ships, in masthouses, a ventilator opening without a ladder going down it. This is the first time I ever seen it. (R.T. pp. 84-89; T.R. pp. 139-145.) On the ships I have been on the bars go all the way across, in the manner I have drawn them here. I had to climb over them. (The photograph, Plaintiff's Exhibit 2, and other testimony of Amundsen demonstrate that he was not at this point talking about bars going across the ventilator shaft but only with respect to the access shaft containing the ladder.) (R.T. pp. 87-89; T.R. pp. 142-143.) I don't remember whether there were any artificial lights. (R.T. p. 88; T.R. p. 143.) When I last saw Hutchison he appeared to be fine as to sobriety and in good spirits. (R.T. p. 89; T.R. p. 144.) At 8:00 o'clock in the morning the hold was not open; all of it was covered. I went down through what was called the escape hatch which goes

through the masthouse. In the morning when I went down there to work in the No. 2 hold about *four or five men* went down *this* escape hatch. We went through the door on the port side of No. 2 masthouse. I *opened* the door. When I opened the door I *saw* a *stanchion* and *two sets of pipe rails* there as indicated on this picture Plaintiff's Exhibit 2. Those two pipe rails and the stanchion were all there at the time when I first went down there in the morning. Those are not movable. They are welded right to the side of the vessel or the bulkhead. The stanchion is welded in place. The stanchion is over three feet in height. I don't recall the order in which we went down. Hutchison and a couple of other ordinaries or A.B.'s and I went down that ladder. I got down to the *bottom* hold and opened the door and came into the No. 2 hold of the vessel. After that all of us, including Hutchison, came up for coffee at 10:00 o'clock and made it up all right. Then I went and had a smoke in Hutchison's quarters. Then the boatswain turned us to again and the *same* gang went back down *this same* ladder. Those rails that I have marked on Plaintiff's Exhibit 2 were present at that time. *We went down without any incident; nothing happened on the way down.* We started to work again down there. Then, *about 11:00 o'clock, something like that*, Hutchison said he was going to the lavatory to get a drink. I saw him go through the door in the hold that leads to this escape hatch. That is the last I saw him. He did not come back. I am not sure if I saw him at lunchtime. *I came up this escape hatch* for lunch *about 11:30 or 25 minutes to 12:00.* I am not sure if I saw Hutchison for lunch. I wouldn't swear to that. It could be possible that I may have seen him for lunch. We turned to again and all went down again, except Hutchison, at 1:00 o'clock. I said I wondered where Scotty was.

I had no conversation with anyone concerning him at that time. All I did was make a remark, "I wonder where Scotty is." I don't recall any remarks being made by any of the members of the gang down there. (R.T. pp. 89-99; T.R. pp. 144-154.) In these particular escape hatches there are sometimes rails which I have designated as "A.A." in this picture, the same as this; those bars go right across. These lines I have drawn indicating bars would bar entrance to the *escape ladder*. We had to climb over on other ships. I do not know exactly when Scotty was found. It was four or five days after the day I last saw him. I went and took a look down here (referring to the ventilator shaft) where they found him. That ventilator shaft brings up air or allows cold air to get down in the hold. There is a ventilator up on top of the masthouse. I have never seen any cover over the opening of the ventilator shaft on that ship. I have never been on vessels where there is a lack or absence of these particular rails guarding the ventilator shaft. There are always bars guarding the ventilator shaft just like there are in this particular picture here, Plaintiff's Exhibit 2. They are all about the same height; that is, a stanchion. There is a screen at the bottom of the ventilator shaft that allows the air to come up or go down in the hold. (R.T. pp. 100-103; T.R. pp. 154-157.)

It was stipulated that the lines which Amundsen put on the photograph, Plaintiff's Exhibit No. 2, to indicate the presence of bars on other vessels or some other vessel that he had worked on are the lines from the stanchion over to the bulkhead, identified as "A.A." and the one directly below it also going to the bulkhead and identified as "A.A." and that the other lines merely indicate the rails the witness was talking about that were surrounding the ventilator shaft. (R.T. pp. 106-107; T.R. pp. 158-160.)

It was also stipulated that all of the photographs, Plaintiff's Exhibits 1 to 11, were taken at the same time up in Portland, Oregon; and that only one door goes into the part of the masthouse through which the men went in order to go to work by going down the escape hatch, the shaft with a ladder. (R.T. p. 109; T.R. p. 161.)

It was stipulated that Plaintiff's Exhibit 4 is the gear locker referred to in the Amundsen deposition located on the starboard side and that *whatever* is shown in there and other things described in the deposition were customarily stored in *that* locker; and that Plaintiff's Exhibit 6 is the overhead screen referred to in Kalnin's deposition. It was also stipulated that Plaintiff's Exhibit No. 9 shows the escape hatch referred to in the Amundsen deposition going down to the hold where the men had been working and the ladder he testified they had used; and that escape shaft ladder is the same one on which Mr. George Wise is standing on part of the escape hatch ladder in Plaintiff's Exhibit No. 1; and that Plaintiff's Exhibit 10 is the ventilator shaft which has been testified to in the Amundsen deposition, looking down to the screen, where Amundsen testified the body of Hutchison was found; and that Plaintiff's Exhibit No. 11 is a picture showing as much of the "Linfield Victory" as you can get in a side view. (R.T. pp. 109-113; T.R. pp. 162-164.)

It was stipulated that Plaintiff's Exhibit 7 shows hatches No. 2 and No. 3 completely covered; and that the particular device that looks like an old-fashioned brass horn, a big one, is the ventilator up on top of the masthouse that Amundsen referred to on both the port and the starboard side; and that there are only three doors in the No. 2 masthouse, one on the starboard side and two on the port side. (R.T. pp. 111-112; T.R. pp. 162-163.)

2. The deposition of Kalnin was taken on May 17, 1952. (TR. p. 113; T.R. p. 164.)

My occupation is seaman, winchman, bos'n and has been for, roughly, twenty years. I have been on practically every type ship made during this time, passenger ships down to schooners. I have had occasion to be on several Victory ships. One was the "Linfield Victory". I was on it on April 24, 1951, as sailing bos'n. I knew Hutchison. He shipped in New York as an able-bodied seaman, maintenance. On April 24, 1951, we were in Baltimore cleaning holds, No. 3 hold; helped pick up the dirt and sweep up the hatch for the new cargo. There was Hutchison, four other sailors and myself down in *that* hold. I told them what to do and laid out the work. (R.T. pp. 114-116; T.R. pp. 165-167.) That was about 8:00 o'clock in the morning and we turned to in *No. 3* hatch. The first thing we did there was open the aft section of No. 3 hatch. There is a ladder there and there is also a ladder in the midship house. You can use either way to go down that hold. We worked until 10:00 o'clock, stopped and went for coffee, and at 10:15 went back in to clean up again, finish the job; and worked until dinner; knocked off about ten to twelve. I observed Hutchison working in *this* hold (No. 3) until dinner time. He left to go up at dinner time, about ten minutes to twelve, the same as the rest of the gang. I saw him once more after that, coming from the messroom. The next time I observed him it was in Philadelphia when we found him, before arrival in Philadelphia, on April 30, about six days later. I observed Hutchison in the No. 3 masthead. He looked to me like he was dead. He was down there. He was missed, but I figured he went ashore, as guys do when they want a day off or so, they just go ashore. Neither I nor any other person *observed* by me made a

search; the only place *we* searched for him was in the fore-castle and in the messroom; and when *we* didn't find him in there, *we just told the mate to hire another sailor*, and we did, thinking he was left behind. I had been on the "Linfield Victory" about four months anyway. (R.T. pp. 159-163; T.R. pp. 188-193.) Plaintiff's Exhibit No. 8 (a photograph) is the entrance to the ventilator shaft, where the railing is. You can easily see the stairway leading down to the hatches, down to No. 3 hatches. This is the ladder on the left and the ventilator on the right. (Plaintiff's Exhibit No. 2.) The ventilator is approximately 20 feet deep. Plaintiff's Exhibit No. 6 is a screen *overhead* of the ventilator. I was Hutchison's superior or gave him orders. Roughly, he would make average wages about \$270.00 a month plus anywhere *from* \$80.00 *to* \$100.00 a month overtime, which was an *average*. (R.T. pp. 164-169; T.R. pp. 193-198.) I signed on as a member of the crew in San Francisco. Hutchison got on the ship in New York. I didn't see him sign any articles. This deck alongside the hatch (access shaft) shown in Plaintiff's Exhibit No. 7 is the main deck. The masthouse I have been referring to is on the port side of the ship. The masthouse doors are watertight. The door over on the right-hand side of the mast is the gear locker; keep your extra wires and slings and stuff like that in there. The hold that the men were cleaning out on the morning I have referred to was the shelter deck, the first deck down from the main deck. The next deck below that is called the lower hold. Roughly, all of us got down there at about the same time from the main deck but it only takes one man at a time on the ladder. Some went down through the masthouse and some went down through the aft part of the No. 3 (hatch). I didn't go down. I could see everything from the deck. I was standing at the winches. I saw Hutchison go down in the morning. He

didn't go down through the masthouse in the morning but he came up that way at noontime. He came up through this ladder in the masthouse. In the morning I saw him go down. I was standing right there. There is a ladder which goes from the forward hatch coaming of hatch No. 3 down to the level of the shelter deck and there is also another ladder at the aft coaming of hatch No. 3 which goes down to the shelter deck. Both of these ladders are vertical ladders exactly like the ladder which is shown in Plaintiff's Exhibit No. 9. Some of the men who were working down there with Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some went down the ladder which was right at the aft coaming of hatch No. 3; both lead to the same place. I was still on deck until they all came up. (R.T. pp. 173-177; T.R. pp. 199-204.) Hutchison came out through the masthouse and walked between the winches and one side to the messhall. I saw him come out of the masthouse. I wasn't watching him coming up the ladder. The only way he could have gotten up from the shelter deck to the main deck unless he came up on the other end, which he didn't, was to come up this ladder in the shaft adjacent to the ventilator shaft. He couldn't have come up any ladder except the one shown in Plaintiff's Exhibit 2 to come out of the masthouse door; he had to come up that ladder. When I saw him walk out of the masthouse door he walked aft, towards the messhall, along the starboard side of the ship. I did not see him in the messhall. I saw him on the companionway, coming from the messhall. Evidently he got there before I did. The messhall is the only place he could have been. I didn't see where he went after that. The other men who had been working down at the shelter deck level of hatch No. 3 went back to that part of the ship and continued working after lunch, 1:00 o'clock. We worked until three that day, fin-

ished the job. Hutchison was not down there at any time between one and three. When he didn't show up at 1:00 o'clock I took it for granted that he had gone ashore and that was the reason I didn't conduct any search for him. As a matter of fact, I had the mate call the police department to see if he might possibly be in jail. When I found out he wasn't in jail I sent for another sailor to take his place. I gave testimony at a Merchant Marine Investigating Unit of the United States Coast Guard, at Philadelphia, Pennsylvania, on May 1, 1951. At that time I stated that I saw Hutchison at dinner time, but I didn't stay long, coming out of the messroom, just had a bowl of soup, started out of the messroom. I didn't see him any more after that. The last place I saw him was in the messroom. His condition regarding sobriety was he was sober, slight hangover. On the day of the accident when I saw him I came to the conclusion that he had been drinking but that all he had was a hangover. When I woke him up in the morning he was in the bunk and there were no bottles, and he was still feeling rough, that's all. When I say "feeling rough", I mean, you know, when a guy stays up late; it is his duty to go to work and he knew it and had to turn to. When I said he had a hangover I mean he was just feeling rough; could have been out late, going around somewhere; when I said he had a hangover I didn't use that word to convey the impression that he had been drinking the night before and had some of the results of it the next day; didn't mean that he was drinking. I know he had been out late. He mentioned the fact he got in at four in the morning. He said, "I hate to work today but I have got to do it."

"Q. How often did the members of the crew, to your knowledge, use the ladder which was in the shaft immediately adjacent to the masthouse ventilator shaft for the purpose of going to some deck below the level of the

main deck and for the purpose of coming up to the main deck from a level below the main deck. A. That ladder is put there for the use—for that purpose—when people are working on the winches, they don't want them to interfere with the winch drivers and get in the way and get hit." They are used *constantly*, all the time, day and night, whenever they are working. Sometimes they work at night as well as daytime. *Longshoremen* use it *all the time*. The hatch was uncovered at the aft end of hatch No. 3 all during the day that I have been talking about, heaving dirt slings out, sweepings from the hold. (It was stipulated at this point that when the witness refers to dirt slings he means a cloth or wire device in which the debris is placed, after being swept up in the hold, and then it is hooked together in some fashion and is hoisted out of the hatch by means of the winch; and then they send the empty sling down the same way, by means of the winch.) The ladder at the aft hatch coaming of hatch No. 3 was available all during that day for the purpose of either going from the main deck down to the shelter deck or from the shelter deck up to the main deck. The ladder in that hatch, meaning the ladder in the masthouse, is the one they used at all times when the hatch is open, so you don't get hit with the winches' loads. The last time I saw Hutchison he was coming from the messroom in a passageway. He was still under cover inside the midship house. I didn't see him at any time out on deck after lunch. "Mr. Gallagher. Then I said, 'He said the reason he didn't make a search was that he figured the man had just gone ashore' to which Kalnin responded: 'which happens when you are alongside a dock.'" I looked in the messroom and in his room and he wasn't there, and called the hospital and police stations and he wasn't there, so we ordered another sailor. When Hutchison was awakened in the morning he wanted to sleep in.

If I didn't give him a good shake he probably would sleep in, wouldn't turn to. I observed nothing in his conduct that would lead me to believe he had been drinking. With respect to the ladder located in the masthouse, going down from the main deck (to) the shelter deck, that was used frequently. (R.T. pp. 181-192; T.R. pp. 206-217.)

3. Castle's deposition was taken September 20, 1952. He is plaintiff's son-in-law. (R.T. p. 192; T.R. p. 217.)

I am a merchant marine officer and have held an unlimited master's license, in steam, any tonnage, any ocean, for nine years. (R.T. pp. 192-195; T.R. pp. 216-218.) I have served aboard nearly every type of vessel in the American merchant marine excepting the vessel in question in this case, a so-called Victory ship. I was aboard the "Linfield Victory" in San Francisco. (R.T. p. 196; T.R. p. 219.) I am familiar with the Victory ship "Linfield Victory" in the respect that I went aboard her in the latter part of May, 1951, in San Francisco. The chief officer, the same mate that was on there when the accident occurred, was aboard the vessel. We went to the No. 2 raised deckhouse. He showed me this ladder and trunk on the port side and explained how the body was found, the position in which it lay. I made an examination of the masthouse and the area surrounding it. *I went up and down the ladder several times and looked down the trunk and looked about the interior of the masthouse.* The mate and I closed the masthouse door to see just how dark it was in there. It was quite dark and this was in late forenoon. "Q. Did you note any screen or other protective covering surrounding the ventilating shaft? A. There was no screen over the ventilating shaft at all. It was open on the top. There was a broken screen on the bottom, the hold end of it, the lower end." "Q. By Mr. Wise: Did you have an opinion as to whether this area constituted a safe place to work? A. I have an

opinion, yes. Q. By Mr. Wise: What is that opinion?

A. My opinion is that with proper illumination or with the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse." (R.T. pp. 196-201; T.R. pp. 220-223.)

4. John Hutchison, brother of the deceased, testified as follows:

On May 27, 1951, Mr. Simpson and I together visited the "Linfield Victory". After boarding the ship I went into the area where my brother was found. In the space that has been described as the masthouse, I *saw* the ladder, the rail, the ventilating shaft and the door. We had the masthouse door opened and saw that there were no light fixtures or evidence of any light in there. I went inside that masthouse, in the morning, before noon. It was a bright day. We opened the door to get in. We closed the door after we went in. I did not see around; no light on. I could not see my hand before my face at two feet when the door is closed. There was no window or transom or skylight in the masthouse. No light was seen coming in through the crack of the door. It was absolute darkness when the door was closed. I had to go through the door to get in so I saw inside that masthouse when the door was at least partly open. I saw into that masthouse when the door was fully open, practically when I am at right angles to the masthouse. "Q. Couldn't you see around pretty well when the door was open when you were in the masthouse? Couldn't you see around the masthouse all right? A. As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see," I mean it was like any enclosed room when you open a door and you are coming in from a bright light, you have to get accustomed to the

darker light. I was in *all* parts of the particular section of the masthouse. I saw ladders. When the door was closed I could not see them. When the door was *halfway open* I could see them; *any light would show the ladders*. I did not see any electrical conduits on the wall or ceiling of that masthouse. (R.T. pp. 350-356; T.R. pp. 283-289.)

5. George E. Wise, one of plaintiff's attorneys, testified as follows:

On May 10, 1952, Plaintiff's Exhibits 1 through 11 were taken in my presence aboard the "Linfield Victory" in Portland, Oregon. Directing my attention to Plaintiff's No. 3, it shows the door open; Mr. Ackroyd, the photographer, had his floodlight run on a ladder, which was inside of the masthouse, and he was standing on something; he took it slanting down from outside. Directing my attention to Plaintiff's No. 1, the photographer used the same floodlight for the purpose of taking that picture. At the time Exhibit 3 was taken I was standing outside of the door in the deck portion. There was a floodlight inside. I stood outside of that door before any floodlight was in there and before any artificial illumination was in there and looked inside the masthouse. This was in broad daylight. I can't tell you in terms of feet how close I was standing to the open door. I either opened the door myself or one of the other gentlemen did. When I opened the door I looked inside the masthouse. Standing outside with the door open in broad daylight, without any other kind of light inside that masthouse, I think it would be like looking into a closet with the door open. You could make out the fact there were things in there, probably make out the rough outline of these things. It would be looking from the outside light into a dark area. It is my testimony, as a fact in this case, that with the masthouse door open and standing outside on the deck in broad day-

light, I could see there were these things in there; not clearly like you can see it here (in the photograph); as I say it is like looking from the outside into a closet. You will see what is in there generally, but you won't see it clearly, as if you have a light on it. "Q. It is your testimony, Mr. Wise, that a door which is not inside of a room, now, and you are not going into a closet, you are going from broad daylight through a door which has the natural diffusion of light, you recognize that, don't you? A. Yes. Q. Is it your testimony under oath, Mr. Wise, that standing out here you were unable to see clearly these pipe railings, the stanchion and the fact there was a ladder in that escape hatch? Will you please answer that yes or no? A. I can't answer it yes or no, because I don't know what you mean by the word clearly. If it is as clear as this, no (indicating)." I think I have said I could see these items in here, but not clearly (indicating). "Q. Well, were you able to see that there were pipe railings around an opening in the deck, to wit, this ventilator shaft? A. Yes, I think you could see the pipe railings." I think I saw the pipe railings before I went in there but I am not sure just whether I did or not. My best recollection would be that, as I say, not clearly as you would see them here, but you could see them; could make them out. There was no difficulty about my eyesight telling me, before I walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft; I could see those. I had no difficulty in making out that there were pipe railings there. (R.T. pp. 130-137; T.R. pp. 168-174.) "Q. I am not asking you what you specifically remember. I am asking you, Mr. Wise, if you testify, as a fact, here under oath, before this jury, that standing outside the

masthouse, close up to the door, with the door wide open, you could not see that there were two shafts in that masthouse, two openings in the deck? A. Well, I don't remember looking specifically to see whether there were two openings or a ladder, or anything like that. I don't have any recollection of seeing them prior to the time we started looking for them when we went inside." (R.T. p. 138; T.R. pp. 174-175.) When I stood outside of the masthouse on the deck here, there was nothing to prevent whatever light there was from getting into the masthouse. Whatever amount of natural light in broad daylight would go through this masthouse door, when it was opened, was inside the masthouse when I stood out there and looked in. "Q. Now, I want to ask you again: Is it your positive testimony that there was not enough light in broad daylight, going through the doorway, wide open, to enable you to see two openings in the deck of that masthouse? Please answer that yes or no. A. No. Q. You could not see it? A. That is not what I said. I say it is not my positive testimony. In other words what I said was I don't recollect looking at these shafts." "Q Eliminating everything excepting the natural light, which was present there all around that masthouse on the day you were there in broad daylight with the door of that masthouse open, standing there at the door, could you, with your degree of visibility, see with just that light openings in the deck of the masthouse? Yes or no. A. I think my answer would be yes, Mr. Gallagher." (R.T. pp. 139-141; T.R. pp. 175-177.) It was about three feet from the doorway into the masthouse to the stanchion which was at the corner of the guard rails around the ventilator shaft. (R.T. p. 143; T.R. pp. 177-178.) Before I went in (the masthouse) I could see these pipe rails and that stanchion was there; generally what you see here, but not

as clearly as this (referring to photograph). I doubt that you could see a ladder here. “Q. Do you remember that you were not able to see the ladder, Mr. Wise, and is it your testimony under oath that standing outside you could not see the ladder? A. All I can say is that I don’t recall seeing the ladder when I looked in.” I am not testifying that I looked in the direction of the ladder and failed to see it; I am not testifying that I saw it; I mean I just don’t recollect seeing it when I looked in, but I could see there was nothing on the floor and see the pipe railings. I just don’t recollect having looked at that specific location before I walked in the masthouse. I just don’t remember one way or the other. On the day when I was up there and these pictures were taken, the hatch was completely covered and closed over. (R.T. pp. 143-148; T.R. pp. 178-182.) I didn’t bring this floodlight that shows in the locker on the starboard side of the masthouse with me and the photographer didn’t bring that either. That is the one that shows in Plaintiff’s Exhibit 4. That was there when the locker was opened up for me on my visit to the vessel. (R.T. pp. 153-154; T.R. pp. 187-188.)

6. Lorkan Crawford testified as follows:

I am president of Crawford Nautical Schools and Crawford Nautical Advisors, and principal of Crawford Nautical Schools. (R.T. p. 202; T.R. p. 224.) I obtained a master’s license about 40 years ago. I have never had any professional experience with Victory ships. I have been aboard Victory ships and am familiar with their construction and design. (Note: All of this witness’ testimony with respect to alleged customs or practices and with respect to what he had observed on ships was admitted over objection of defendant.) In the course of my experience aboard ships I have had occasion to observe

or know there was a custom with regard to accounting for men. (R.T. p. 205; T.R. p. 226.) To the best of my knowledge such a custom was in effect on April 24, 1951. That custom was to *account for the working hours and places of each member of the crew at all times*. There was a custom to *account* for men who were missing. To the best of my knowledge that custom was in existence on April 24, 1951. The custom was to *determine* when a man was *assigned* to any particular work *that he performed that work* so that an accounting could be kept in a logical way of his man hours. If a man were missing there was a custom for *ascertaining* his whereabouts. To the best of my knowledge that custom was in existence on April 24, 1951. The reason I qualified my answer is that I teach these men on ships, and in 1951, I was so employed and not actually on a ship. Therefore, *my knowledge of the custom necessarily would be by study and hearsay*. I tell you about the custom *as it is imparted to me from the men who execute the custom*. The custom in the case of a missing man is that his immediate superior reported to his immediate superior or executive of the particular department, deck, engineer or steward; that executive of the department then institutes a search, to determine the whereabouts of the missing man, if that is possible. *That search would necessarily include an inspection of the man's living quarters, eating quarters, and working quarters on the vessel, but should perhaps include every portion of the vessel*. In the course of my experience I have observed a custom or know of a custom with respect to the *illumination of work areas* aboard a ship, *such as a masthouse*. That custom is to thoroughly illuminate any area in which a man or men are working. Plaintiff's Exhibit No. 4 is a masthouse. This portion you are now pointing to at the upper center of Plaintiff's No. 4 is the

cowl of the ventilator. "Q. Showing you Plaintiff's No. 7, I ask you how far down does such a ventilator go. A. The cowl should end at the top of the masthouse. The ventilator shaft continues to the compartments to be ventilated. Q. Directing your attention again to Plaintiff's 4, with this open hatch door, I ask you, can you see the ventilator shaft? A. Yes. Q. Where is it? A. There (indicating). Q. It that an open ventilator shaft? A. No." These particular bars marked on Plaintiff's Exhibit No. 2 as "rails" are guard rails. In the course of my experience, I have never seen rails projecting or going across that area (identified as "AA", "AA". In the course of my experience I have seen other *protective* devices such as these guard rails around the ventilator shaft. I have seen a heavy screen which *excludes the danger; it would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity. That screen would be located where the guard rails are now. Several hundred of the Victory-type vessels were built by the United States of America during the last war. I have been aboard approximately five of them. I did not go into the masthouse on each of those five. (R.T. pp. 209-216; T.R. pp. 229-235.) The last time I acted in any capacity as a member of a crew or a licensed officer on any ocean-going vessel was about January of 1943. I have not been employed in any capacity aboard any ocean-going vessel since January of 1943. (R.T. pp. 218-219; T.R. p. 237.)*

7. Emma Hutchison, plaintiff, testified as follows:

I am the widow of N. P. Hutchison. He and I were married November 4, 1940. He was a steel worker or iron worker on construction iron work, also worked in the oil fields, and was a seaman. He began to work as a seaman in 1943. He worked as *able seaman, boatswain's mate* and

maintenance man on cargo ships. I last saw him about March 21, 1951. (R.T. pp. 300-302; T.R. pp. 258-259.) On April 24, 1951, my husband was 44 and I was 53. Mr. Hutchison contributed to my support. Whenever he came off a trip he would give me around seventy-five percent or thereabouts of his money; he kept the rest; and we decided where to put it and what to do with it. We disposed of it, in the bank or whatever we wanted to do with it, like any other family does. (R.T. pp. 304-306; T.R. pp. 261-262.) (There is no testimony whatever with respect to how much of the "around" seventy-five percent "or thereabouts" take-home pay was used by or reasonably or otherwise required for Mrs. Hutchison's support and maintenance.) Neither Mr. Hutchison nor I had any relatives or friends in Baltimore, Maryland. Prior to the time I married Mr. Hutchison I had been married to a man named McFee, who died. I have five living children as a result of the marriage to Mr. McFee. I have said Mr. Hutchison had been a steel worker; he was a structural steel worker; worked not only on the ground but high up on the buildings in the course of construction. (R.T. pp. 307-308; T.R. pp. 264-265.)

Plaintiff's Exhibit 17 (R.T. p. 304; T.R. p. 262) is the Joint Federal Income Tax Return of plaintiff and her husband for the calendar year 1950. This exhibit shows total gross earnings by Hutchison as \$4705.96, with income tax withheld at the source in the sum of \$581.65. Therefore, the total "take-home" earnings of the deceased for the entire year 1950 was the sum of \$4124.31. Seventy-five percent of this "take-home" pay is the sum of \$3093.23. Multiplying \$3093.23 by nineteen years, the full life expectancy of plaintiff, results in the total sum of \$58,771.37. *(There is no evidence showing that Mr. Hutchison was employed or earned any money whatever*

during 1951 up to the time he was employed by appellant on April 17, 1951.)

Plaintiff's Exhibit 15 (R.T. p. 300; T.R. pp. 257-258) consists of log entries from midnight, April 16, 1951, to midnight, April 30, 1951. On the page for April 23, 1951, with reference to "lookouts", it appears that Hutchison was on duty as a lookout, and presumably awake, from midnight April 22, 1951 to 8:00 a.m. April 23, 1951. The pages for April 24, 1951, show that the weather conditions were clear at Baltimore, Maryland, from 1:00 a.m. to midnight, with the exception of high, thin clouds at 4:00 p.m. Presumably, there being no evidence to the contrary, the sun was shining at Baltimore, Maryland, from sunrise to sunset on said date. Said pages also show that stevedores were working in the No. 1 and No. 4 holds and that at 8:00 a.m. the crew turned to cleaning holds. (Obviously referring to hold No. 2 where Amundsen testified he worked and that Hutchison worked; and to hold No. 3 in which Kalnin testified that Hutchison had been working before Kalnin saw him come out of the masthouse door at about ten minutes to 12:00 A.M. on said date.) The log entry in April 24, 1951, also shows that at 5:15 p.m. "Olive Kupau, A.B., reported for duty".

Defendant-appellant produced the oral testimony of two witnesses, Webb and Dyer, with respect to the subject matters of liability, contributory negligence and negligence on the part of N. P. Hutchison as the sole proximate cause of his injuries and death. The substance of the testimony of these witnesses is as follows:

(a) Webb. My occupation is marine surveyor and has been around nine years, employed by United States Salvage Association, the headquarters of which are in New York City. I was present aboard the "Linfield Victory" at the time Mr. George Wise, one of plaintiff's attorneys,

went aboard. Walter Haines and a photographer were with the party. Walter Haines is a marine surveyor in Portland, Oregon. It was 10:00 a.m. on May 10, 1952, a clear day, when we went aboard. I and Mr. Haines, in conjunction with each other, measured the *openings going down in the forward end of No. 3 hold and the after end of No. 2 hold* on the left-hand side, looking forward; measured the stanchion, the pipe railings and other matters *in and about the masthouse*. The diagram prepared by Mr. Haines (Plaintiff's Exhibit 12) shows various measurements. They appear to be the measurements I and he took at the time. At the time we took these measurements we were inside the portion of the masthouse where the ventilator shaft and the escape shaft are located on the port side of the masthouse No. 2. The access door which is shown here in Plaintiff's Exhibit No. 3 was both *opened and closed* when I and Mr. Webb were in there taking these *measurements*. While it was opened I took measurements and made notes of them. While the door was opened I did not have any difficulty in seeing the figures on the rule or seeing any of the devices in and about the upper area of the masthouse. "Q. State whether there was or was not any artificial illumination inside the masthouse when you had the door open and you and Mr. Haines were measuring these things and making your notes? A. As far as I can remember—I have no notes on that—there was a cluster light or a cargo light that was *dropped down there during that period of time*"; *down into No. 2 ventilator*. (The cluster light and the No. 2 ventilator referred to are shown in Plaintiff's Exhibit No. 10.) Up on *top, in the masthouse itself*, while making my measurements, I had only the lights from the cowlings ventilator and the door. We asked to have lights put in there during the time of our survey. In that mast-

house, with the door open and without artificial illumination, you could see your protective hand rails, your opening and your ladder leading down into the forward end of No. 3 hold. There was no difficulty about observing those things without artificial illumination. There was some light inside the masthouse when the door was closed when there was no artificial illumination in there on that day. That light came from the ventilator, the same ventilator cowl that Captain Crawford described. My description of that ventilator shaft, from having observed it personally, would be very near the same as his. There was nothing other than a hollow tube with a wire screen on both tanks. (Sic: obviously an error of the court reporter. The word "tanks" should be "ends".) The only thing to restrict the incoming of light from the outside would be the screens. I closed the masthouse door at a time when there was no artificial illumination in there. When I did close the masthouse door, and without any artificial illumination inside the masthouse, I could see with just the daylight that came through the ventilator cowl your (the) opening and your (the) hand rails way down in the hold. I could see the top of the ladder. I could see the hand rails or guard rails around the ventilator shaft without any difficulty at all. I do not mean by that, that the light on the inside was the same as the light on the outside. It is my testimony that the light inside was diminished and in order to do my surveying properly I needed light. When I was up there I observed an electrical appliance outlet, which is plugged in, right alongside the jumbo boom, on the after bulkhead of the masthouse. (R.T. pp. 232-238; T.R. 232-254.)

(b) Dyer. I live in Portland, Oregon. I am employed by Pacific-Atlantic Steamship Co. as marine superintendent. In that capacity I have charge of, inso-

far as operation of vessels may be concerned, maintaining, storing, repairing and general navigation. I am and have been fully licensed as a master mariner since 1926. I am or was familiar with the steamship "Linfield Victory" in 1951. That vessel was owned by the United States of America, Department of Commerce, Maritime Administration. It was bare-boat chartered to Pacific-Atlantic Steamship Co., including the period of the month of April, 1951. The vessel was in the process or course of an intercoastal voyage when it was in Baltimore, Maryland, in April, 1951. In cases of that kind, shipping articles are required to be signed by the master and all members of the crew who are members of the crew for such a voyage (intercoastal). The photostatic copy of shipping articles I have in my hand is a photostatic copy of regular intercoastal shipping articles involving the period mentioned. Those articles (were) opened in Portland, March 10, 1951 and were closed at San Francisco on May 28, 1951. The object which appears in the lower right-hand corner of the space just inside the open locker door on Plaintiff's Exhibit 4, a photograph, is a portable cargo light. The object immediately below the arrow, identified as "E.O.", Plaintiff's Exhibit No. 7, is a marine outlet, an outlet for an electric current for plugging in lights. In the event it is dark any place in a hold or in a mast-house a cargo light may be used for the purpose of supplying artificial illumination; that is their purpose. It is the right of any member of the crew to take such a light and use it in case he desires to do so; we have no restrictions on their use of the lights. Requisition No. 1, dated March 9, 1951, shows that there were 22 cargo lights on hand on the vessel on that date. The licensed officers ordered an additional four. These four lights referred to in the requisition were delivered to the vessel before the com-

mencement of that voyage. I have been in masthouse No. 2 of the "Linfield Victory" and in the masthouse No. 2 in many other Victory ships. Pacific-Atlantic Steamship Company handled for the United States Government, so far as shoreside business was concerned, 36 or 37 Victory-type vessels, besides six that we purchased outright. We had five or six under bare-boat charter. The others were operated by the Government under this general agency agreement for operation for the Government. In those cases, where the Government retained the right to operate the ship and my company acted merely as general agent, I went aboard those ships; I visited them frequently. I have been present quite frequently while Coast Guard inspectors were inspecting Victory ships, sometimes in Portland; sometimes Seattle. I have seen it done both places. In the *course of the inspections* made by the *Coast Guard* inspectors, *their inspection includes the entire vessel, all cargo spaces and masthouses*, with the exception of the double-bottomed tanks or fuel oil tanks. Those are not in the masthouse. In all of the Victory ships that I have seen, I have not seen any which were any different than the No. 2 masthouse as shown in these photographs taken of the "Linfield Victory". With reference to these shafts, I see in this picture here, Plaintiff's Exhibit No. 1, where there is a steel plate which goes across the top of the sheet of steel which separates these two shafts. This picture (Plaintiff's Exhibit No. 10) shows a view down the ventilator shaft in No. 2 masthouse. With reference to the screen down at the bottom of that shaft, it leads to the No. 2 lower hold. No. 2 lower hold would be the hold which is covered by the hatch covers immediately forward of the masthouse as shown in Plaintiff's Exhibits 7 and 8. If you cut out this screen (referring to the screen at the bottom of the ventilator shaft) there would not be any obstruction

whatever between the bottom of the ventilator shaft and lower hold No. 2. "Q. Now, Captain, there has been some testimony here by the boatswain to the effect that the after portion of Hatch No. 3 was uncovered on April 24, 1951, at the time when Mr. Hutchison and other men were working down there in the lower tween deck, in Hold No. 3, and that the winches were being operated to take out dirt slings. Now, under those circumstances, Captain, where does the man operating the winches stand? Would he be back here at the winches, immediately at the after end of Hatch No. 3? A. He would be on the after end of Hatch No. 3 facing the masthouse. Q. Facing Masthouse No. 2? A. Yes. Q. Does the expression 'I am standing by the winches' what does that mean? A. It means he would be standing by the throttles of the winches. There are two winches, operated by one man. Q. So he would be—— A. Controls would be together in the center of the hatch. Q. He would be operating the winches then? A. Yes." If a man is standing at the winches, at the after end of hatch No. 3, he would be facing forward. The entire deck forward of the after end of hatch No. 3 would be visible to him. The door to that portion of the masthouse containing the ventilator shaft and the escape shaft would also be visible to such a man. A man walking on deck and approaching the door to that masthouse would be visible to the individual who is standing at the winches. I have been on board the "Linfield Victory", recently in Oakland, about the middle of August, 1955. The vessel was docked at the Oakland Army Base. The United States is now operating that ship. My company is acting as general agent for it. I went in masthouse No. 2 on the occasion in the middle of August when I was up there in Oakland. The inside of the masthouse was no differ-

ent in the slightest particular than indicated in these photographs on the board, so far as physical appearance is concerned. (Plaintiff's Exhibits 1-11, inclusive, all of which had been thumbtacked to a blackboard.) The inside of the masthouse was the same as it was from the time we took delivery of her. That vessel had been inspected by Coast Guard inspectors since April, 1951, at the regular annual inspection. While she was laid up in fleet reserve they wouldn't hold the inspections, but she was re-inspected when we took her out early this year. When you climb down this ladder where Mr. Wise appears in Plaintiff's Exhibit 1, and you want to go into the deck immediately below the main deck or the deck immediately below the last one mentioned, to wit, two decks below the main deck, you get from the ladder into the hold by a door opening at the side; a man who goes down would step on a plate at the particular deck level he would want. There is a door that opens and you walk into the particular hold. The after section of hatch No. 3 was open on the day when I examined the "Linfield Victory" in the middle of August, 1955, at Oakland. The vessel, so far as hatches were concerned, was in the same general condition, the physical layout, as in 1951. The hatches and the size of the holds and so forth were the same. With the after section of hatch No. 3 removed I could see some light coming through the door openings, that I have referred to, leading from the lower holds into that escape ladder shaft. On the day when I examined the "Linfield Victory" it had these ventilator cowls on the masthouse. I went inside masthouse No. 2. I closed the door and dogged it down. That door can be dogged or undogged either from the outside or the inside. A dog is just an iron rod which is hinged or swiveled at one end. You just take hold of it and pull it down and it goes

against a wedge shaped piece of metal and that pressure pushes a door closed so that it is watertight. I went in there and dogged (the door to) that portion of masthouse No. 2 containing the ventilator shaft and the escape shaft referred to in these photographs. It was a clear day. When I went inside, with the door closed, there was light which came in through the ventilator cowl. It was quite light. There was ample to see your way around. I could see the stanchion, the pipe railings, the ladder and that there were two shafts there, very plainly. I also went inside the masthouse with the door open. "Q. And what was the condition of visibility in there with reference to whether you could or could not read ordinary newspaper print? A. Well, I believe that I could have read print inside as well as out, provided I had my glasses." The ship was operated by the Government. All of these things I testified to have reference to physical things I say I observed when I went in that masthouse. *I understand, of course, that if I have testified to anything which is not true, it would be a very simple matter for the proper authorities to check up on me by going into that masthouse themselves. I realize that my testimony about the condition of visibility inside that masthouse relates to a material fact in this case.* There was no custom that I know of, in April, 1951, with reference to searching a ship for a man, not on articles, who fails to show up at the appointed time for his job, when the ship is tied up at a dock in any city in the United States. I have never heard of any such thing. When seamen are not on articles they can quit any time they want to. "Q. They just walk off and say nothing? A. Well, they come back to claim their pay. But that is quite often what happens. They will just walk off and come back later, or come back to the office and claim their

pay.” The log entry in Plaintiff’s Exhibit 15 under date of Tuesday, April 24, 1951, “1715 Olive Kupau, A.B. reported for duty” means that at 5:15 p.m. on that day an able-bodied seaman named Kupau reported for duty.

“Q. Captain, it appears here in the record that Ernest Kalnin, the boatswain, gave testimony at an investigating unit of the Coast Guard at Philadelphia, on May 1, 1951. I would like to ask you, Captain, whether that is the same branch of the Government I am talking about, the Coast Guard, the same branch of the Government of the United States as conducts the inspection and certification of vessels of the type of the ‘Linfield Victory’?”

A. That is correct.” With reference to these other Victory ships that my company owns, and those which it has operated under bare-boat charters, and those with reference to which it has acted as general agent for the United States, each and every one of those ships was inspected and a regular certificate of inspection issued for each and every one of them by the Coast Guard. “Q. Did all of these inspections occur at either Portland or Seattle, or were they inspected at times throughout the United States? A. Oh, they were inspected at times throughout the United States, wherever—— Q. So there would be many different inspectors who inspected and passed these vessels? A. Wherever the certificate expires, there you have to have—the first American port, has to be inspected.”

(The following testimony of Dyer was given on cross-examination.) I have never tried to read a newspaper in that masthouse, even with my glasses. You call my attention to Plaintiff’s Exhibit No. 4, the starboard side of the masthouse. From the very top, this is a cowl for the starboard ventilator shaft. That shaft goes down to the lower hold, the same as the one on the port side. Looking

in there is something which blocks that off; bulkhead. This shaft is not like this one here, indicating Plaintiff's Exhibit No. 1. The starboard shaft is not available from this end. In my experience I have never at any time seen a screen or a grate of any kind over the head of a ventilator shaft on a Victory ship. I have never seen them on any other kind of ships. Referring to Plaintiff's Exhibit No. 4, the masthouse on the starboard side, I pointed out a cargo light. That particular object there is a portable cargo light. If a seaman wanted to use a portable light in masthouse No. 2 on the port side he would connect it at this outlet right here, this place marked on Plaintiff's Exhibit No. 7 as "Electrical Outlet." If a person wanted to use this light inside of masthouse No. 2 on the port side he could not close that door and have a cord go through that dogged door. "Q. A last question, Captain: When you were in masthouse No. 2 on the 'Linfield Victory', with the door closed, was the light on the inside the same as the light out on the deck, without a covering? A. You mean was— Q. Was the illumination as bright? A. Oh, no, naturally it couldn't be. Q. With the door open was it as bright? A. No."

(Re-direct Examination) There was no way for any seaman or anybody else to get into that portion of masthouse No. 2 where the ventilator shaft and the escape shaft were located, from the main deck, without opening the door and walking through it; that is the only access. On these Victory ships there are ladders at the forward and after hatch coamings of hold No. 3. It would be perfectly possible for a man to go from the deck down such a ladder to a lower hold, and then walk through the door at the forward bulkhead of hold No. 3 and go from there up the ladder, in the escape shaft; he could come down one way and go up the other. After he came up this ladder, the only way he could get out of the mast-

house would be to either walk through an open door or open the door and walk out. (R.T. pp. 474-502; T.R. pp. 309-331.)

The questions involved are the following:

1. The court erred in denying defendant's written motion to strike the matter contained in Paragraph IX of the First Amended Complaint; said written motion having been filed in October, 1952; and erred in denying defendant's oral motions, during the course of the last trial, to strike said matter.

2. The court erred in denying defendant's motion for a directed verdict with respect to the matter set forth in Paragraph IX "That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to-wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the Port of Philadelphia, State of Pennsylvania."

3. The court erred in permitting the plaintiff to introduce irrelevant, immaterial, impertinent, and passion and prejudice arousing evidence upon the subject of defendant's failure to search for and discover Hutchison at the bottom of said ventilating shaft in an injured condition prior to his death.

4. The court erred in denying defendant's oral motions to withdraw the subject of defendant's failure to search for and discover Nathanael P. Hutchison in an injured condition and prior to his death from the consideration of the jury.

5. The court erred in denying defendant's motion for a directed verdict, at the close of the evidence offered by the plaintiff, with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

6. The court erred in each and every ruling, order, decision or action adverse to the defendant, appearing within and shown by the matters and things included within defendant's designation of the record on appeal; and in this respect, defendant contends that none of said rulings, orders, decisions or actions was invited, encouraged, or waived or consented to at any time or in any manner whatsoever or at all, by reason of any act or omission of defendant.

7. The court erred in denying defendant's motion, at the close of all of the evidence, for a directed verdict in favor of defendant with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

8. The court erred in denying defendant's motion for judgment notwithstanding the verdict with respect to the claim designated in the first amended complaint as the "Second Cause of Action"; and in its ruling denying defendant's alternative motion for a new trial with respect thereto; and there was an abuse of judicial discretion in the ruling of the court with respect to said alternative motion for a new trial.

9. The court erred in refusing to give to the defendant reasonable time and opportunity to assign as error the giving of, and the failure to give, instructions in that defendant's attorney was arbitrarily denied a reasonably sufficient time and opportunity to state distinctly the matter to which the defendant objected and the grounds of its objections.

10. The evidence is insufficient to support the finding of the jury that at the time Nathanael P. Hutchison suffered the personal injuries from which he died the said Hutchison was acting or engaged in the course of his employment.

11. The evidence is insufficient to support a finding that there was an insufficiency in the appliances in and about the ventilator shaft referred to in Paragraph VIII of the first amended complaint or that, in this respect, there was a failure on the part of the defendant to provide a reasonably safe place in which to work.

12. The evidence is insufficient to support a finding that there was an insufficiency, due to defendant's negligence, in its safety appliances in and about the ventilator shaft or that, in this respect, there was a negligent failure on the part of the defendant to provide a reasonably safe place in which to work.

13. The evidence is insufficient to support findings in favor of the plaintiff with respect to the issues of material fact raised by those averments set forth in Paragraphs IV, VII and VIII of the claim designated in the first amended complaint as "First Cause of Action" and incorporated by reference thereto in the "Second Cause of Action" and the averments of Paragraph II of said "Second Cause of Action" which are denied in defendant's answer.

14. The evidence is insufficient to support a finding that Nathanael P. Hutchison fell into or was precipitated to the bottom of said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support a finding that said ventilator shaft was an open ventilator shaft.

16. The evidence fails to show actionable negligence on the part of defendant as averred in the first amended complaint.

17. The jury erroneously failed to find that negligence on the part of Nathanael P. Hutchison was the sole proximate cause of his death.

18. The evidence is insufficient to support the finding of the jury that negligence on the part of Nathanael P. Hutchison did not proximately contribute to his death to any extent or proportion in excess of 10 percent of the total proximate cause of said death.

19. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of Fifty Thousand Dollars (\$50,000.00).

20. There was irregularity in the proceedings, acts and conduct of the court, jury and plaintiff's attorneys and orders of the court and abuse of judicial discretion, by which the defendant was prevented from having a fair trial.

21. Excessive damages were awarded under the influence of passion and prejudice and arbitrary conduct upon the part of the jury.

22. The court erred in admitting into evidence the testimony of Amundsen with respect to screens over the top of ventilator shafts on other ships, horizontal bars precluding entry into the access shaft adjacent to said ventilator shaft on other ships; that he had never seen on any other ship a ventilator shaft without a ladder therein; and those portions of the testimony of Castle that there was no protective screen over the top of the ventilator shaft and that with the door to the masthouse closed it was quite dark inside said masthouse; and the testimony of John Hutchison (brother of the deceased) that with the masthouse door closed there was absolute darkness inside said masthouse; and the testimony and conclusions of Crawford with respect to the subjects of custom or practice, and thorough illumination of all areas of work; and with respect to heavy vertical screens in place of the pipe railings; that the ventilator shaft was a dangerous area; and that said ventilator shaft was adjacent to an area of access.

23. The court erred in refusing to grant defendant's motions, and each thereof, to strike testimony and other evidence with respect to the issue of actionable negligence upon the grounds stated in such motions, and each thereof, and in accordance with such motions, and each thereof.

24. The court erred in instructing the jury as it did and in failing to instruct the jury in a distinct, concise, direct and impartial manner upon the law applicable to the issues of material fact with respect to *actionable* negligence raised by the averments of the first eight paragraphs of the first amended complaint which were denied by defendant in its answer thereto; and with respect to defendant's special defense premised upon negligence on the part of Hutchison proximately causing or proximately contributing to his injury or death.

25. The court erred in refusing to instruct the jury upon the essential elements of actionable negligence on the part of defendant in connection with and as limited by the averments of the first amended complaint with respect to the claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; and in the failure and refusal of the court to restrict and confine the possibility of a verdict against the defendant exclusively to said specific and only claim of alleged negligence on the part of defendant.

26. The court erred in failing and refusing in the instructions given to the jury to fairly, distinctly and accurately state and define the issues of material and pertinent fact raised by those averments of the first amended complaint denied in the answer of the defendant, or to confine the fact finding power of the jury thereto.

27. The instructions as a whole are misleading, contradictory, confusing, inaccurate, incomplete and lack distinctness. The instructions as a whole contain indiscriminate, improper, extraneous and erroneous statements and comments by the trial judge.

28. The instructions as a whole contain inaccurate, irrelevant and improper interpolations by the trial judge having no legitimate bases in the law applicable to the genuine issues of material fact or the material, relevant and competent evidence and not necessary for the proper guidance of the jury in its deliberations.

29. There was an erroneous failure of the court in the instructions given to the jury of its own motion, fairly or completely or at all, to state or define the *issues* of material fact raised by the material and pertinent averments of the first amended complaint and the denials thereof in defendant's answer thereto; and erroneous failure of the court to instruct the jury with respect to the sole statutory basis of possible liability on the part of the defendant as to plaintiff's claim for damages by reason of the death of Nathanael P. Hutchison; an erroneous failure of the court to instruct the jury with respect to the essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; an erroneous failure of the court to properly instruct with respect to the burden of proof imposed upon the plaintiff and defendant or to fully instruct thereon; an erroneous refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael P. Hutchison upon the subjects of actionable

negligence on the part of the defendant, contributory negligence on the part of Nathanael P. Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; and the instructions given to the jury by the court of its own motion are indistinct, incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to legal liability imposed by the Jones Act, the issues of material and pertinent fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the instructions given by the court of its own motion contain much matter and improper comment which is completely extraneous to proper statements of law which can be given to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions interpolated and made improper, unfair and inaccurate comments with respect to the effect and weight of evidence, the elements of actionable negligence on the part of defendant, contributory negligence on the part of Nathanael P. Hutchison, the subject of damages and other matters; the court improperly instructed and commented with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, the substance of those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover applicable principles of law contained in the following instructions proposed by the defendant: Numbers 1, 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38,

39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65 and 66.

30. The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory No. 3, which reads as follows: "On what date and at what time on said date did Nathanael P. Hutchison come in contact with the bottom of the ventilator shaft?"

III.

SPECIFICATION OF ERRORS.

Appellant specifies the following as assigned errors relied upon by it in the presentation of its contentions on appeal:

Points 1 to 30 in the "Statement of the Points on which Appellant Intends to Rely", *supra*, pp. 45-52, are by reference thereto adopted as assigned errors 1 to 30, inclusive.

31. The court erred in denying the oral motion to dismiss the purported claim set forth in paragraph IX, made upon the ground that paragraph IX does not aver facts sufficient to show that the plaintiff is entitled to relief. (R.T. pp. 411-415; T.R. pp. 304-308.)

32. The court erred in admitting and refusing to strike (where such motions were made) the following evidence:

(a) (Testimony of Amundsen): The arrangement of the "Linfield Victory" was different from the arrangement I was familiar with on other ships in that "other ships got screens down here, and stuff like that" over the openings of the ventilator shaft. (R.T. p. 88; T.R. p. 142.) I have not seen on other ships, in masthouses, a ventilator opening without a ladder going down it; this is the first time I have ever seen it. (R.T. p. 88; T.R. p. 143.) I have been on other ships that have access ladders in the

masthouse. The arrangement of the guard rails appears to be different than those on other ships I have served on. On other ships the bars go right across the area above the starboard edge of the access shaft where the ladder is. (R.T. pp. 84, 85, and 100; T.R. pp. 139-154.) The lines which had been placed on the photograph, Plaintiff's Exhibit 2, and identified by the letters "AA" and "AA" were received in evidence for consideration by the jury. (R.T. pp. 104-105; T.R. pp. 157-158.)

(b) (Testimony of Crawford): In the course of my experience aboard ships I have observed or know of a custom with regard to accounting for men. (R.T. p. 205; T.R. p. 226); that custom, in effect, to the best of my knowledge and belief, on April 24, 1951, was to account for the working hours and places of each member of the crew *at all times*; and to the best of my knowledge, there was a custom to account for men who were missing. That custom was to determine when a man was assigned to any particular work that he performed that work so that an accounting could be kept in a logical way of his man hours; and if a man were missing there was, to the best of my knowledge, a custom for ascertaining his whereabouts. The custom in the case of a missing man is that his (absence is) reported to his immediate superior or executive of the particular department; deck, engine or steward. That executive of the department then institutes a search to determine the whereabouts of the missing man, if that is possible. That search would necessarily include an inspection of the man's living quarters, eating quarters and working quarters on the vessel, but should perhaps include every portion of the vessel. I have observed or know of a custom with respect to the illumination of areas, work areas aboard a ship, such as a masthouse. That custom is to thoroughly illuminate any area in which a man or men are working. In

the course of my experience I have seen other *protective* devices such as these guard rails around the ventilator shaft. I have seen a heavy screen which *excludes* the danger; which would *exclude* a dangerous area when there was an *area of access immediately close* to it or *in the vicinity*. (R.T. pp. 209-215; T.R. pp. 229-235.)

(c) (Testimony of Castle): "Q. Did you note any screen or other *protective* covering surrounding the ventilating shaft? A. There was no screen over the ventilating shaft at all. It was open on the top." (R.T. p. 200; T.R. pp. 222-223); I went aboard the "Linfield Victory" in the latter part of May, 1957, in San Francisco. (R.T. 197; T.R. p. 220); the mate and I *closed the door to the masthouse* to see just how dark it was in there. It was quite dark and this was in late forenoon. (R.T. p. 199; T.R. p. 222.) When I went aboard the "Linfield Victory" in the latter part of May, 1951, in San Francisco, I introduced myself to the chief officer who was on duty and he showed me the space involved. I don't recall his name. I know he was the same mate that was on there when the accident occurred. He stated to me that he was the same mate that was on there when the accident occurred. (R.T. pp. 197-198; T.R. pp. 220-221.) He showed me this ladder and trunk on the port side, and explained how the body was found, the position in which it lay. (R.T. pp. 198-199; T.R. pp. 221-222.)

(d) (Testimony of Kalnin): When a conclusion that the man had just gone ashore is not reached I conduct a search on a ship. (R.T. p. 191; T.R. p. 215.)

(e) (Testimony of Adelstein): If an autopsy report showed the cause of death to be subdural hemorrhage and fractured skull I customarily regard that as valid. (R.T. p. 471.)

(f) (Testimony of John Hutchison): On May 27, 1951, in the morning, before noon, a bright day, I went

inside the masthouse and *closed the door* after I went in. I did not see around; no light; no window, transom or skylight in the masthouse; no light coming through the crack of the door. It was absolute darkness when the door was *closed*. (R.T. pp. 351-354; T.R. pp. 286-287.)

(g) (Defendant's admission in response to written requests therefor): The court received in evidence defendant's admission that on April 24, 1951, "there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was found on April 30, 1951." (R.T. pp. 308-331; T.R. pp. 265-268.)

(h) Testimony of Dickerson): Acute dilatation of the heart "to some doctors may mean that, and again to the same man or well-trained man, it may not be acute dilatation. It is a relative term". It means one thing to one doctor and another to another. It is not a precise term; some conditions are referred to as acute dilatation by one doctor, which another doctor would not use that term in referring to. (R.T. pp. 513-555.) On the basis of the assumed facts in the hypothetical question I have an opinion as to what could be done to save a man's life having experienced such injuries. The proper procedure would be the immediate opening of the head to evacuate the blood clot. (R.T. pp. 517-518.)

In the absence of the jury, prior to the introduction of any evidence, the trial judge was informed with respect to objections and ruled that each question asked of any witness whether by deposition or otherwise would be deemed objected to upon specified grounds and that each answer would be deemed subject to a motion to strike upon the same grounds. (R.T. pp. 2-43; T.R. pp. 102-128.)

1. The objections to testimony with respect to what witnesses had seen on other ships as compared with the

physical design and construction of masthouse No. 2, the shafts therein and its appurtenances and the adverse rulings are set forth in the record. (R.T. pp. 2-43; T.R. pp. 102-128.)

The grounds of the objections and motions to strike are as follows: There is no foundation laid. There is no relevancy to the specific issue alleged in the amended complaint. The conduct of others must have occurred under circumstances substantially similar. We are dealing here with a specific part of a cargo vessel, to wit, a masthouse. (R.T. pp. 5-6; T.R. pp. 102-103.) What I am talking about is the masthouse. That is the only area which is involved in this case and the only area which is referred to in the pleadings. (R.T. p. 9; T.R. pp. 104-105.) (1) The evidence is immaterial; (2) the evidence is irrelevant; (3) the evidence is incompetent; (4) there is no proper foundation laid; (5) the evidence goes outside of the specific issue with reference to alleged negligence as set forth in the plaintiff's complaint, which refers solely and only to the ventilator shaft in masthouse No. 2, the allegation being that the defendant negligently "failed and neglected to supply sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." (R.T. pp. 9-10; T.R. pp. 105-106.) The objection as to foundation goes to lack of foundation in that the witness would not have had observation of a masthouse aperture of the nature involved in this particular litigation, unless the witness specifically so stated. The objection with reference to the subject of foundation is the same as that with reference to competency, materiality or relevancy, and it is premised in part upon the rule that the conduct of others must have occurred under circumstances substantially similar to those

existing in the case at bar. (R.T. pp. 11-12; T.R. pp. 106-107.)

The marks placed on Plaintiff's Exhibit 2 by Amundsen for the purpose of comparison with other vessels were admitted subject to the same objection. (R.T. p. 83; T.R. p. 138.)

Defendant objected additionally and particularly to the question put to Crawford as to whether he had seen "other protective devices such as the guard rails around the ventilator shaft", upon the ground that it called for a conclusion; and a motion to strike his answer that the purpose of a heavy screen was to exclude a dangerous area when there was an area of access immediately close to it or in the vicinity, was made on the same ground. (R.T. pp. 214-215; T.R. pp. 234-235.)

After both sides had rested, defendant also moved to strike Crawford's testimony that he had observed heavy screens located where the pipe railings are located in Plaintiff's Exhibits Nos. 1, 2 and 3, upon the grounds that there is no evidence showing that it amounted to a custom or that the conditions were substantially similar, or that it amounted to any more than single instance of what he had observed some individual shipowner may have done. (R.T. p. 576; T.R. p. 336.)

2. The grounds of the objections to the testimony of Crawford and Kalnin with respect to alleged customs and the motions to strike are as follows: Any question asking any witness "what is the custom or practice" or "Do you know of a custom or practice" calls for a conclusion. The only way in which to prove custom or practice, in the face of an objection, is to establish a series of things actually observed by witnesses, the sum total of which would enable a jury perhaps to find, as a question of fact, there was a custom or there was a practice. (R.T. pp. 13-14; T.R. pp. 108-109.) Custom or prac-

tice is not a subject of expert testimony. The question assumes there is a custom or practice and permits the witness to express a conclusion that there is such custom or practice. You are permitting the witness to decide for himself what constitutes a custom or practice when he is not qualified to do so. (R.T. p. 16; T.R. p. 110-111.) The witness is required to give those specific instances and to describe the particular part of the vessel involved, so as to bring it within an area like the one we have involved here. (This particular objection also applies to the subject matter of what any particular witness claimed to have observed on "other ships" or "some other ships.") (R.T. p. 19; T.R. p. 113.) Testimony as to a custom, based upon statements made by the Coast Guard or at lectures would be hearsay; any questions about what anybody had heard at any lectures or what anybody else told him would be hearsay and a repetition of conclusions. (R.T. p. 23, T.R. p. 117.) In the event questions are asked with respect to an attempt to establish a custom or practice, the defendant objects to each such question upon the following grounds, severally and separately and distinctly, and not in the conjunctive: (1) the evidence is immaterial; (2) The evidence is irrelevant; (3) The evidence is incompetent; (4) It calls for a conclusion and opinion of the witness; (5) The opinion and conclusion of the witness is predicated upon hearsay statements or matters which he claims to have read; (6) The introduction of such evidence would deprive the defendant of due process of law; in that the defendant would have no opportunity to cross-examine the people who may have made statements to the witness upon which the witness bases a conclusion that there was a custom or practice; and with reference to books or periodicals, they could not be introduced in evidence. Therefore, any conclusions reached by the witness, as a result of reading

periodicals or books, would likewise be incompetent and hearsay. (R.T. pp. 24-25; T.R. pp. 118-119.) The objection to each question with respect to an alleged custom of conducting searches for missing crew members is deemed to physically appear in the record immediately following each question along the line of searching for missing crew members and the record is also deemed to physically show a motion to strike on the same grounds set forth in the objection. (R.T. pp. 206-207; T.R. pp. 226-227.) The evidence is entirely irrelevant and not within the issues pleaded; when any custom is relied upon it must be pleaded; they don't claim this was a custom of the defendant. (R.T. p. 207; T.R. p. 227.) A special objection and motion to strike Crawford's testimony with respect to alleged customs referred to by him, as soon as the witness stated he intended to tell about the custom as it was imparted to him from the men who executed the custom, was made upon the ground that the testimony was based on hearsay, in addition to the other grounds. (R.T. pp. 210-211-212; T.R. pp. 231-232.)

When all of plaintiff's evidence was in defendant moved the court to exclude from the consideration of the jury, in any event, the issue raised by the averments in paragraph IX that the defendant and its employees were further negligent in failing to search for and discover Hutchison in an injured condition until April 30, 1951, upon the ground, *inter alia*, that there was no evidence showing that as a proximate result of any failure to find him before he was found, he suffered injury or death. (R.T. p. 309.)

After all of the evidence was in and both sides had rested, defendant made a supplemental motion to strike as follows: Defendant moves the court for an order striking from the testimony of Crawford all testimony

which he gave with reference to an alleged custom of searching for missing members of the crew or absent members of the crew, and his conclusions and opinions with reference to what part of a ship should be searched, upon the following grounds: None of said evidence was competent; none of it was relevant; it was based solely, insofar as 1951 was concerned, upon what he had read in books and what he had been told, to-wit, hearsay; so far as what parts of a ship should be searched when a seaman not on articles is missing or absent from work is concerned, that stated a pure, unadulterated conclusion; there is no evidence of any kind or character with reference to the existence of any such custom at Baltimore, Maryland, in April, 1951, and no reference to any such custom pursuant to the particular vessel, to-wit, the "Linfield Victory". (R.T. pp. 575-576; T.R. pp. 335-336.) Long before the trial, in October, 1952, defendant objected to the subject matter of paragraph IX of the first amended complaint upon the grounds that it was immaterial, impertinent, and not within the possible factual bases of liability pursuant to the Jones Act. (T.R. pp. 8-9.)

3. The objections with respect to the subject of the lack of a permanent electrical installation inside the port compartment of masthouse No. 2; with respect to the degree of visibility therein with the door to the masthouse completely closed and hatch No. 3 completely covered; and the thorough illumination (artificial) of work areas such as a masthouse are as follows: There is no occasion for illumination in the absence of proof that a particular place is dark: a proper foundation would have to be laid showing that the masthouse was in a state of darkness at any time when Hutchison was required to use it or might properly use it in the course of his employment. Light is not required unless a place is dark.

In the absence of proof that a place of work is dark there is no relevancy to any evidence with reference to artificial illumination; with reference to this particular masthouse, on this particular ship, the question of permanent lighting fixtures, or the question of temporary lighting fixtures would not be material or relevant, in the absence of proof showing that, at any time when Hutchison was required to be there, (it was dark). (R.T. pp. 33-34; T.R. pp. 123-124.) In the absence of substantive evidence of darkness in the masthouse at the time they claim that Hutchison was in it and at the time they claim he fell into the ventilator trunk, the question of illumination is improper and there is no proper foundation laid. (R.T. pp. 35-36; T.R. pp. 125-126.) I object to that question (with respect to conditions in the masthouse with the door closed) upon the ground that it is immaterial, in that there is no evidence proving or tending to prove that the hatch door was closed at any time while Hutchison was within the masthouse or within the escape shaft in masthouse No. 2. (R.T. p. 41; T.R. pp. 127-128.) I object to the introduction of the request (1c of plaintiff's written requests for admissions) and to the introduction of either part or all of the reply upon the ground that there is no evidence in this record, direct or indirect, showing that at any time when Hutchison could have been within the area of masthouse No. 2, in the course of his employment, there was any necessity for any artificial light of any kind or character; there is no evidence, direct or indirect, showing the time of day when Hutchison got into the ventilator shaft; neither is there any evidence, direct or indirect, showing the date upon which he got into the ventilator shaft, to-wit, whether it was the 24th of April or the 25th of April. (R.T. pp. 328-331; T.R. pp. 266-267.)

4. The objections to Castle's testimony as to the identity of the mate are as follows: The question calls for hearsay; the answer states a conclusion of the witness. A motion to strike the statement "he was the same mate" was made upon the ground it states a conclusion of the witness. The question "Did he state that to you?" was objected to upon the ground it calls for hearsay; there is no evidence showing he was acting as an agent of the defendant in having a conversation with Castle. The statement "He explained how the body was found, how it lay, the position in which it lay" was subject to a motion to strike on the ground that it states a conclusion of the witness, the question is predicated upon hearsay, it is likewise incompetent. (R.T. pp. 38-41.)

5. The objection to the testimony of Dr. Adelstein with respect to the validity of an autopsy report is as follows: The question is not proper; no witness can be asked to pass on the effect of the testimony of another witness; it is immaterial; it is asking one witness to pass on the qualifications of another. (R.T. pp. 470-471.)

6. The objections to the testimony of Dr. Dickerson with respect to what the term "dilatation of the heart" may mean to doctors other than himself, was objected to upon the following grounds: It states his conclusion and opinion with reference to what Dr. Glauser may have meant when he said there was acute dilatation, and I move to strike out his conclusion that it means one thing to one doctor and another to another. (R.T. pp. 513-515.)

7. The objections to the opinion of Dr. Dickerson with respect to the proper procedure to save a man's life when the man had sustained fractures of the skull and subdural hemorrhage are as follows: It is not an issue, to-wit, what could be done by a physician and

surgeon; no proper foundation laid; it is immaterial, not relevant to any facts in issue here. (R.T. pp. 517-519.)

33. The instructions as contained in the reporter's transcript and as printed in the Transcript of Record are not the instructions as *actually* given to the jury. Appellant's motion to procure a correct record was denied by this Court on September 12, 1956. Therefore, the appellant is compelled, over its objection to deal with the instructions as they appear in the printed Transcript of Record. The Court erred in its instructions, interpolations and comments as follows:

(a) The language "you are the exclusive judges of the fact," means that so far as your decision upon the facts is concerned, "your judgment is *final*, and *no one can inquire into it.*" "But *no one officially has any power or ability to set aside your decision as to the facts in the case.*" "The *litigants and the judge must accept what you return here as the verdict as to the facts.*" (R.T. pp. 756-757; T.R. pp. 493-494.)

(a-1) That law (workmen's compensation) does not apply to ships at sea, and if there is to be a recovery here it must be upon particular principles of law and because the defendant has breached some one *or more of its duties*, and that breach has been the proximate cause of the injury. (R.T. p. 759; T.R. p. 496.)

(b) A party against whom ^{such} a rebuttal presumption is directed, if he intends to deny it, *must*, of course, *present evidence to the contrary.* (R.T. pp. 765-766; T.R. p. 501.)

(c) Now, no expert and *no certificate of inspection* may *suffice* for your duty. To the extent that those things are in evidence, consider them as evidence, to be weighed with all the other evidence. But the sole duty, as far as the problem in this court is concerned, and so far

as that problem exists between those litigants is for you. It is your judgment and you must approach it *independently* of what *any* witness for either the plaintiff or the defendant, or *any other body or inquirer*, has had in their experience, in so far as that has been related to you. *All former inquiries have had a somewhat different purpose* than the inquiry which is here today. This one in this case is individual to the purposes and requirements of this case, *and to the extent that other matters, such as the inspection and the observations of witnesses* who have come here and told you what they have observed are concerned, you should bear in mind that *it is up to you* and you have the responsibility of deciding this case, and you do not simply rubber-stamp any opinion which has been presented here, *regardless of the form of evidence by which it has been presented.* (R.T. pp. 770-771; T.R. pp. 505-506.)

(d) Now, I am not going to read the entire Complaint to you. But I will read an excerpt from it which states what Mrs. Hutchison contends, insofar as the *heart of her cause of action*, the *disputed* portions of it, are concerned here.

Now, it has not been disputed, for instance, that she is the executrix or administratrix—I forget which—in any event, the person handling the affairs of the deceased or that she is the widow of the deceased, and so on. All those things she had to set forth in her complaint.

But I will read what the *lawyers* call the *charging language of her complaint* now at this time, insofar it concerns the *first* cause of action. (The court then read only the averments of paragraph VIII.) (R.T. pp. 771-773; T.R. pp. 506-507.)

(e) In the absence of knowledge or notice to the contrary, and in the absence of circumstances that caution him, or would caution a reasonably prudent person in

like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and he may rely and act on that assumption. (R.T. pp. 773-774; T.R. p. 508.)

(f) The fact that Nathanael Patrick Hutchison had not yet signed Articles at the time of receiving his personal injuries in no way deprives him of his *rights* under the law upon which this action against the Pacific-Atlantic Steamship Co. has been predicated. (R.T. p. 774; T.R. p. 508.)

(g) In the *event of injury* Nathanael Patrick Hutchison was *entitled* to the *rights* which the court has referred to and *will* refer to in *these instructions*, unless he had actually left such employment and whether or not he had commenced employment or whether or not he had left the employment are questions that are exclusively for the jury. (R.T. pp. 774-775; T.R. p. 509.)

(h) "The *gist* of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove *negligence*, for unless the seaman can establish *negligence* of the *owners* of the vessel, or *her officers, agents, or employees*, no liability exists." (R.T. p. 775; T.R. p. 509.)

(i) The *negligence* of the *owners* of the vessel may consist in the *failure to supply and maintain a vessel properly equipped and manned* or the *negligence of the master or members of the crew*. (R.T. p. 775; T.R. p. 509.)

(j) Now, the *exact day*, the *exact hour* of the incident, which has been alleged to have been an accident and which has been alleged to have been due to *the failure of the defendant to use reasonable care in providing a reasonably safe place in which to work*, the *exact time* is not material. (R.T. p. 775; T.R. p. 509.)

(k) The *exact time of events*, if they flowed from *defendant's negligence*, need not be spelled out in detail by the evidence. (R.T. p. 775; T.R. pp. 509-510.)

(l) “*Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do some act which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.*” (R.T. p. 776; T.R. p. 510.)

(m) *If, for instance, and this is just an illustration—I don’t suggest to you it is true, but you should consider whether it is, and it is an illustration of that instruction—you believe from all the evidence that Mr. Hutchison was feeling rugged—whatever that means, but you have heard the testimony—and that he had a hangover, then you would consider whether or not a man, knowing that he felt rugged and having a hangover would go into the type of act or acts in which he was engaged at the time of the injury.*

That is, would he go about masthouses and climb up and down ladders or would he take a sick-leave? Was it ordinary prudence, was it reasonable care for him to do that?

If you find that it was not or if you find there was some other contributory negligence—at the moment as I sit here that is the only thing in the evidence which occurs to me, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is, negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed. (R.T. pp. 779-780; T.R. p. 513.)

(n) *There are two causes of action. Lawyers speak of the basis of a lawsuit or the claimed basis of a lawsuit as a cause of action and each particular basis is a cause of action in itself.* Mrs. Hutchison in her Complaint has set forth two causes of action. (R.T. p. 781; T.R. p. 514.)

(o) We have talked a lot about evidence. It might just be of use to you—I think it should be included in a charge—to read you a law dictionary definition of evidence. I have selected the one which appears in Black's Third Edition at page 696: "That which furnishes or tends to furnish proof. It is that which brings to the mind a just *conviction* of the truth or the falsehood of *any* substantive proposition which is asserted or *denied*."

"That which *demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other.*" (R.T. p. 784; T.R. pp. 516-517.)

(p) Now, the evidence here with respect to what the plaintiff claims was failure to search for Mr. Hutchison, under what she claims were circumstances that were such as to require a search, relates only to that first cause of action.

You will recall that there has been in issue tendered her as to how long, if at all, Mr. Hutchison was conscious after he fell into the shaft, and the only item of damage which is claimed on that first cause of action is damage for conscious pain and suffering.

Now, as has been argued here, there might have been some palliative or comforting treatment, so that evidence was admitted upon that first cause of action. It is not to be deemed to apply to the second cause of action. As I told you, there are two causes of action, each of which should be borne in mind separately.

However, the law respecting negligence, the law respecting contributory negligence, the law respecting damages, which I have given you, all applies to the second

cause of action, except that with respect to damages there are additional matters which I should call to your attention.

Liability, if it exists, depends on the same facts respecting *negligence*, if it existed, contributory negligence, if it existed, the need for proximate cause, and so forth, as the *first cause of action*. (R.T. pp. 785-786; T.R. pp. 517-518.)

(q) Now, I will read you just *the charging part of the Complaint* which Mrs. Hutchison has filed on *that second cause*: “That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and the time of the death being to the plaintiff unknown, that said Nathanael Patrick Hutchison left surviving him as a dependent of the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages”. (R.T. pp. 785-786; T.R. p. 518.)

(r) That second cause of action is different in this respect:—in all other ways it is the same as the first—in this respect it is different from the first, it is *Mrs. Hutchison’s claim, not his*. It is her claim for damages because she has lost her husband, who she says was a substantial contributor to her support, and she says, “I have been damaged in that regard by reason of the same facts.” Minus the pain and suffering, of course, but by the same facts which produced death in the partial bread-winner of her family.

So you see *this is her cause of action* and not his, and if you decide this one, you decide it in her favor for the damage which she has suffered. (R.T. pp. 786-787; T.R. pp. 518-519.)

(s) Now, all persons are presumed to use reasonable care. That is a presumption. It applies in this case to Mr. Hutchison in his activities at and about the time this incident occurred. It applies to the defendant corporation at and about the time this occurred. It is a presumption.

You are to look only to the evidence in the case. (R.T. p. 789; T.R. p. 521.)

(t) I will read them to you. "IF THE VERDICT IS IN FAVOR OF PLAINTIFF,—" Counsel, these are exactly the ones which were in the file, which have been referred to as the Court's.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

By that we mean what was her pecuniary loss at the moment of his death, *because she had been precipitated into the state of widowhood by that death.* (R.T. p. 791; T.R. p. 523.)

(u) Now, of course, before you would find a verdict in favor of Mrs. Hutchison upon cause of action No. 2, you would have found that the defendant was guilty of *negligence* and that such negligence was a proximate cause of an injury from which Mr. Hutchison died, *and that answer is included in a verdict in favor of the plaintiff.*

But you would also then answer this interrogatory, "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?"

We mean by *that* the *contributory negligence* that *I have dealt with in these instructions.* (R.T. p. 792; T.R. pp. 523-524.)

(v) Those are all the interrogatories.

The foreman *will fill in the answers.* The foreman *will fill in the general verdicts,* and *they* will be returned with you. (R.T. p. 794; T.R. p. 526.)

(w) The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to *the cause of action* which has been *charged* there, that is, you are not to go beyond the *nature* of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that. (R.T. p. 820; T.R. p. 548.)

(x) You don't have to introduce every new thing that is known to science, but you must keep your premises within which employees are required to work, or which they will use in going to or fro from work or in their reasonable access to the place of employment, you must keep those premises reasonably safe. "Reasonably" is the key word. (R.T. pp. 821-822; T.R. p. 550.)

(The foregoing instructions, interpolations and comments from (a) to (v) are from the instructions prior to the statement of defendant's exceptions and objections which it was physically possible, within the arbitrary time limit imposed upon the defendant by the Court, to state for the record. (w) and (x) are matters stated to the jury immediately prior to the time it was sent to lunch at 12:55 p.m., October 14, 1955.)

The following occurred after the jury had been deliberating until 10:23 p.m., October 14, 1955, at which time the jury returned to Court with specific written questions:

(y) Plaintiff claims that Mr. Hutchison was injured due to *the negligent failure of the defendant to provide a reasonably safe place in which to work*. That as a result of *that* the accident occurred. That Mr. Hutchison then had conscious pain and suffering, as a result of the injuries which he sustained, after the accident had occurred.

Now, the evidence about failure to conduct a search was offered and admitted and should be considered for just this purpose. You have the question.

If you find that there was liability *because of the failure to use reasonable care* to maintain a reasonably safe place to work, you have the question *then of determining what damages should be awarded.* (R.T. p. 831; T.R. p.)

(z) Now, if Mr. Hutchison was having conscious pain and suffering you would want to know for how long a period he had such conscious pain and suffering. And hence, the failure, if there was a failure, to search for him would be proper evidence for you to have in your mind when you consider how long that conscious pain and suffering lasted.

Now, *there is the question of whether, under all the circumstances, a reasonably prudent master of a vessel would have had a search made.* You will have to determine that if you come to *that* question.

But it all goes to the problem of how long the man lived and how his *pain and suffering* could have been *palliated or eased* if he had been found by a *more prompt search than the one which finally led to discovery of the body.* *That is how the failure to make a search enters into it.* (R.T. pp. 831-832; T.R. pp. 551-552.)

(aa) Now, these causes of action are very different, very distinct. The first one, as I told you at considerable length this morning, is *actually a cause of action* which has been inherited here by Mrs. Hutchison in her representative capacity, because Mr. Hutchison, who *was the owner of that cause of action*, is dead, but it is a cause of action based upon his pain and suffering, his damages suffered during his lifetime.

The second cause of action is a suit brought by a widow because of what she claims was the negligence of the defendant in having brought about the death of her husband. (R.T. p. 834; T.R. pp. 554-555.)

(bb) She says, "I have lost the support of my husband *because the Linfield Victory did not use reasonable care*

to provide my husband with a reasonably safe place within which to work, and because of that I claim damages against the operators of the Linfield Victory, the damages being the amount of money, as nearly as it can be prudently calculated, that I would have received from Mr. Hutchison had he continued to live." (R.T. p. 835; T.R. p. 555.)

(cc) Then you have asked that I read you the causes of action. I hope I can find them here among the papers we had this morning. I don't find them readily at hand. Can you hand me up the file?

Here they are. The *first* cause of action in its charging language, that is, *the essence of the complaint* reads this way: "That on or about the 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and the performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilator shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and

suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances, in and about said ventilator shaft to provide a reasonably safe place in which to work.” (R.T. pp. 836-837; T.R. pp. 556-557.)

(dd) Now, I *return to reading*, and I am reading you the *gist* of the *second cause of action*, which, after stating that Mrs. Hutchison was the wife of Nathanael Patrick Hutchison, and that she received the usual support that a wife receives from her husband, says:

“*That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages*” and as a matter of law the only damage for which she could collect.

If you find that the death was caused, as it has been alleged to have been caused, if you find, as a matter of fact, it was so caused, the only damage for which she can collect is her money loss reasonably calculated to be sustained by her by reason of the fact that she has been deprived of contribution to her support by her husband over whatever period of time you find, as reasonably prudent jurors, carefully calculating it, she has been deprived of that. (R.T. pp. 838-839; T.R. pp. 558-559.)

(ee) *And there is only one lawsuit in which she can collect, that is, she can't come back here next year and say, "I want more."* And if she dies tomorrow, and you read about it, if you have returned a verdict, you couldn't

come in and take any of it away. *You just have to determine what the natural expectancies are and what sum of money can be awarded today on that second cause of action.*

All this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was "... directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

That it negligently *did* that. That is the *type* of negligence that is alleged, not any other.

Foreman Eager. Your Honor.

The Court. Yes.

Foreman Eager. *Do I understand you correctly by that last remark, that where you have referred to the type of negligence that is alleged in the second cause of action, that the negligence and failure to conduct a search was not alleged in the second cause of action?*

The Court. *That is true.* You see, it couldn't enter into the second cause of action because, in any event, the woman has lost a husband.

Now, when he died if he did not die *because* of negligence she has no claim. If he did *not* die *because* of the particular *kind* of negligence charged here she has no claim upon this defendant. But if he did die *because* of the particular negligence, which has been charged here, then her right accrued the moment he died.

And it wouldn't make any difference whether he was immediately discovered, whether his body was immediately discovered or whether it wasn't. It wouldn't have made any difference if they had seen him fall and had immediately taken him to a hospital, and he had had the best of care and comfort and was given sedatives so that he didn't

suffer at all. But, nonetheless, he died. (R.T. pp. 839-840; T.R. pp. 559-560.)

(ff) *Her cause of action is based upon the fact that she has lost the support of that husband due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.*

And that doesn't include the making of a search for him, but it does include, of course, and is based upon his death under the circumstances which she has claimed brought that death about.

So whether a search was made or not has nothing to do with the second cause of action. It might have something to do with the first cause of action; that is up to you. (R.T. pp. 840-841; T.R. p. 560.)

(gg) Foreman Eager. *Your Honor, I feel sure that some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with the cause of action, the second cause of action. If you wish, I can tell you why.*

The Court. It would be unlawful for you to tell me why. We are a court of law, so we have to live by it.

Foreman Eager. Will you tell us, *is it because it was not set forth in the complaint, is that the reason we cannot consider it?*

The Court. No. No, *that is not the reason.* The reason is that the law just does not allow damages for failure to make the search, that is, it does not allow damages to the widow.

Of course, there might conceivably be some situations in human affairs where there would be such a cause of action, but this is not that kind of a suit.

This is a suit brought by a woman who says, *"I was the dependent wife or partially dependent wife of a man who had been killed due to particular negligence of the defendant."*

And if she is right in that, then she is entitled to be compensated for her money loss. The law is very hard on all matters. It takes the view that a money loss is what is compensated in courts and *money loss is what she suffered*. (R.T. pp. 843-844; T.R. pp. 562-563.)

34. The Court erred in refusing to instruct the jury in accordance with written requests of the defendant, or in substance or legal effect, as follows:

(a) On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. (No. 1; T.R. p. 24.)

(b) On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: It is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. (No. 6; T.R. p. 26.)

(c) You shall not consider as evidence any statements of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. (No. 10; T.R. pp. 28-29.)

(d) The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. This complaint contains two separate and distinct claims. In the first of these claims she contends that Nathanael Patrick Hutchison sustained conscious pain and suffering between the time he was injured and the time of his death. In the second claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result thereof the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the

SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and located directly adjacent to an open ventilating shaft; and that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies that at any time after 12:30 p.m.

on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant as an able-bodied seaman or in any other capacity. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint is denied in the answer of the defendant.

A statute enacted by the Congress of the United States provides that in case of the death of any seaman as a result of personal injury suffered in the course of his employment, the personal representative of such seaman may maintain an action for damages and that the employer of such deceased seaman shall be liable in damages to his personal representative for the benefit of the surviving widow for such death resulting in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances. Said statute enacted by the Congress also provides that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law in the event such injury results in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances and that such right of action shall survive to his personal representative,

for the benefit of the surviving widow of such seaman.

The material issues of fact with respect to the question of liability submitted to you for decision are the following:

(1.) Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

(2.) Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in plaintiff's complaint. (No. 11; T.R. pp. 29-33.)

(e) (The first 5 paragraphs of this proposed instruction are in substance the same as the first 5 paragraphs of No. 11 and are not, therefore, set forth verbatim here; but by references thereto, are incorporated herein.)

The issues of fact with respect to the foregoing averments of the complaint which have been denied in defendant's answer submitted to you for decision, are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the said averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving any of the averments set forth in plaintiff's complaint and which are denied in the defendant's answer. (No. 11-A; T.R. pp. 33-37.)

(f) The mere fact that Nathanael Patrick Hutchison may have suffered personal injuries resulting in his death is not sufficient to entitle the plaintiff to recover any damages whatever even though Nathanael Patrick Hutchison may have been engaged in the course of his employment at the time he suffered such personal injury. There is no liability whatever on the part of the defendant in this case in the absence of proof of a negligent failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place in which to work and proof by a preponderance of substantial evidence that such, if any, failure on the part of the defendant proximately caused or proximately contributed to the personal injuries suffered by Nathanael Patrick Hutchison. (No. 12; T.R. pp. 37-38.)

(g) In your deliberations you are not permitted to determine what issues of fact are raised by the pleadings. Whether an issue of fact is or is not raised by the pleadings is a question of law and is within the sole province of the Court. (No. 13; T.R. p. 38.)

(h) The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course or performance of his duties or under the direction of an agent of the defendant or in furtherance of the interest of said de-

fendant at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilating shaft in the course of any duty or employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff. (No. 14; T.R. pp. 38-40.)

(i) The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course of his employment at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of his employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff. (No. 14-A; T.R. pp. 40-42.)

(j) Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint

that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages, you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthouse No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to find defendant was not negligent in this respect. (No. 15-A; T.R. p. 43.)

(k) There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with *a* safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff in this respect, denied by the defendant, is that the defendant negligently failed and neglected to supply the deceased with *sufficient* safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening

at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of his duties with a condition of reasonable safety *in the event such seaman was exercising ordinary care for his own safety and preservation*, then you are instructed that no duty was imposed by law upon the defendant to provide *any other, different or additional safety appliance* in and about the said ventilator shaft. (No. 16-A; T.R. pp. 44-45.)

(l) In so far as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides, in so far as it may be applicable to the averments set forth in plaintiff's complaint, that the employer of a seaman shall be liable in damages in the event his death is proximately caused, or proximately contributed to, by reason of any insufficiency, due to to ship operator's negligence, in its safety appliances in and about the ventilator shaft located in masthouse No. 2. Thus, in order to prevail on the second claim, the plaintiff must prove by a preponderance of substantial evidence that there was actually an insufficiency in the defendant's safety appliances in and about said ventilator shaft; that such, if any, insufficiency was due in whole or in part to negligence on the part of the defendant and that the death of Nathanael Patrick Hutchison was proximately caused or proximately contributed to by such, if any, negligence. (No. 17; T.R. pp. 45-46.)

(m) The law imposed upon the defendant the duty of exercising ordinary care to supply reasonably ade-

quate safety appliances in and about the ventilator shaft located in masthouse No. 2 to provide a reasonably safe place to work, but this does not require the defendant to provide safety appliances which would have made the ventilator shaft reasonably safe for the use by or protection of *any seaman excepting one who in his reasonably necessary use of the masthouse in and about the ventilator shaft is exercising ordinary care for his own safety and preservation. There is no duty imposed by law upon a ship operator to provide sufficient safety appliances which might be necessary for the purpose of preserving the bodily safety or life of a seaman who in his use thereof does anything which an ordinarily prudent seaman would not do or fails to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances.* (No. 18; T.R. pp. 46-47.)

(n) Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. *While the foregoing definition of negligence is a general definition, you are instructed that in applying this definition to the question of liability, if any, on the part of the defendant you are restricted to the evidence, if any, with respect to the specific claim of negligence which the plaintiff avers in her complaint.* (No. 19; T.R. p. 47.)

(o) The proximate cause of an injury or death is a *negligent act or omission* which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury or death, and without which the result would not have occurred. *In this connection you are reminded of the proposition that the plaintiff*

does not aver in her complaint that the defendant committed any negligent act. (No. 23; T.R. pp. 48-49.)

(p) You are instructed that in the absence of evidence, direct or indirect, to the contrary, it is a presumption of law that the defendant in the pending case did not fail, negligently or otherwise, to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In the absence of evidence, direct or indirect, to the contrary your finding on this issue of fact must be in favor of the defendant. If you find in favor of the defendant on this particular issue of fact your verdict must be in favor of the defendant with respect to both of the claims asserted by her in her complaint. (No. 24; T.R. p. 49.)

(q) *You are not entitled to indulge in any presumption excepting those, if any, which the court in these instructions shall state is a deduction which the law expressly directs to be made from particular facts.* (No. 25; T.R. pp. 49-50.)

(r) Every finding which you make during your deliberations and which is used as a basis upon which you arrive at and render a verdict must be based upon direct or indirect evidence.

You are further instructed that you are not entitled to indulge in any presumption from direct or other evidence actually introduced into the record unless the court states to you specifically that you are entitled to indulge in some specific presumption or presumptions. While you are entitled to decide the credibility of a witness you are not entitled to add anything to the actual evidence which has been introduced. In other words, while you may, if you believe you are justified in doing so, disbelieve all or any part of the testimony of any

witness who has testified before you either by way of deposition or in person, you can not add anything to the testimony of any such witness. (No. 65; T.R. pp. 78-79.)

(s) One of the essential elements with reference to which the sole and exclusive burden of proof by a preponderance of evidence rests upon the plaintiff in this case is that at the precise time when Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died, the relationship of employer and employee existed between said Nathanael Patrick Hutchison and the defendant and that he was engaged in the course of his employment as such employee. In this connection, you are instructed that until a seaman signs shipping articles or makes some oral agreement with the Master of a vessel pursuant to which the seaman obligates himself to assume for some specific period of time the status of an employee and thus subject to the call of duty as a seaman, the seaman has a right to quit his job at any time he may see fit to do so. (No. 28; T.R. pp. 51-52.)

(t) You are instructed that regardless of the existence or non-existence of sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work there is no liability on the part of the defendant in this case unless the plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison actually suffered personal injury in the course of his employment. In this connection a seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his con-

tract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered personal injury, your verdict will be in favor of the defendant with respect to each of the claims set forth in plaintiff's complaint. (No. 30; T.R. pp. 52-53.)

(u) A seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered the personal injuries proximately caused at the time he struck the bottom of the ventilator shaft, you must find that the defendant is not liable for any damages by reason of conscious pain and suffering on the part of Nathanael Patrick Hutchison or by reason of a failure, if any, of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. (No. 30-A; T.R. pp. 53-54.)

(v) Your specific attention is directed to the proposition that there is no averment in the plaintiff's complaint charging that the personal injuries and death of

Nathanael Patrick Hutchison were or that either thereof was proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to negligence on the part of defendant is her contention, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify the rendition of a verdict in favor of the plaintiff, she is required to prove by a preponderance of substantial evidence the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.
2. That such personal injury was suffered in the course of his employment.
3. That there was failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.
4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.
5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof. (No. 31; T.R. pp. 54-55.)

(w) You are instructed that there is no averment in the plaintiff's complaint charging that the personal injuries sustained at the time Nathanael Patrick Hutchison fell to the bottom of the ventilator shaft were proximately

caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to the injuries sustained by her deceased husband at said time is her claim, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify or support a finding in favor of the plaintiff upon the issue with respect to said claim, she is required to prove by a preponderance of substantial evidence, the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.
2. That such personal injury was suffered in the course of his employment.
3. That there was a failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.
4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.
5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof. (No. 31-A; T.R. pp. 55-56.)

(x) No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant, before the happening of the accident, in the exercise of that amount of care which would have been exercised by an ordinarily prudent employer under the

same or similar circumstances. It is of the essence of actionable negligence that the party charged should, in the exercise of ordinary care and caution, have knowledge that the omission complained of was such an omission as might, within the realm of probability, cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability in consequence of an omission will be imposed must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof. (No. 32; T.R. pp. 56-57.)

(y) It is of the essence of actionable negligence that a preponderance of the evidence must show that the party charged should, in the exercise of ordinary care and caution, have anticipated that the omission complained of was such an omission as might cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability, by reason of an omission, will be imposed, must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof. (No. 32-A; T.R. p. 57.)

(z) In order to warrant or support a finding that an omission is a proximate cause of an injury, injury at least in some form must be shown by a preponderance of the evidence to have been foreseeable by the defendant, in the exercise of ordinary prudence, in the light of the attending circumstances. (No. 35; T. R. p. 58.)

(aa) One test to be applied in deciding whether there was or was not a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work is the following: Prior to the time that Nathanael Patrick Hutchison in some manner got

into the ventilator shaft and fell to the bottom thereof would an ordinarily prudent person operating the SS "Linfield Victory" have anticipated that the pipe railings surrounding the opening at the top of the ventilator shaft were not reasonably sufficient to protect a seaman exercising ordinary care of his own safety and in the full possession of normal faculties from inadvertently falling into said ventilator shaft? If you answer this question in the negative, there was no negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. (No. 35-A; T.R. pp. 58-59.)

(bb) One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be substantial evidence justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew. (No. 36; T.R. p. 59.)

(cc) One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be evidence, direct or indirect, justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew. (No. 36-A; T.R. p. 59.)

(dd) It is sufficient if a safety appliance be such as is reasonably fit for its purpose and reasonably adequate for the purpose of preventing accidental injury to an employee who is exercising ordinary care for his own safety. (No. 33; T.R. pp. 57-58.)

(ee) It is not the absolute duty of an employer to furnish a safe place to work. The only obligation is that

the employer exercise reasonable care to provide a reasonably safe place in which to work. (No. 34; T.R. p. 58.)

(ff) You may not indulge in speculation, surmise or conjecture with respect to any of the matters or elements as to which the law places the burden of proof upon the plaintiff. (No. 38; T.R. p. 60.)

(gg) You are not permitted to speculate, conjecture or surmise with respect to when, how or in what manner Nathanael Patrick Hutchison sustained the injuries resulting in his death. (No. 39; T.R. p. 60.)

(hh) You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, *while exercising ordinary care for his own safety*, from *inadvertently* falling into said ventilator shaft in the course of his employment, *and that said pipe railings constituted a safety appliance for that purpose*. If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the ventilator shaft in order to provide a reasonably safe place to work, your finding with respect to said issue of fact must be in favor of the defendant. (No. 40-A; T.R. p. 61.)

(ii) The disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety cannot be used by you as a basis of a finding that the defendant failed or neglected to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. Therefore, in deciding whether the defendant did or did not fail or neglect to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work you are precluded from basing a finding with respect to that issue of fact directly or indirectly

upon the disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety. (No. 52; T.R. p. 67.)

(jj) The employer of a seaman is not an insurer or guarantor of his safety or life. The design and construction of an appliance is not required by law to be absolutely safe to the end that it is impossible for a seaman to be injured or to lose his life. (No. 42; T.R. pp. 61-62.)

(kk) A steamship operator is not guilty of actionable negligence in the event such operator merely fails to anticipate carelessness or lack of care upon the part of an employee who may suffer injury. (No. 43; T.R. p. 62.)

(ll) The defendant in this case has admitted that there was no permanent artificial lighting fixture installed in that part of masthouse No. 2 where the ventilator shaft referred to in the evidence was located. In this connection, you are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the inside of said masthouse was in a state of darkness and that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work. (No. 44; T.R. p. 62.)

(mm) You are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the actual visibility inside of said masthouse, at or immediately before Nathanael P. Hutchison fell, was such that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work. (No. 44-A; T.R. pp. 62-63.)

(nn) If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant with respect to each of plaintiff's claims. (No. 45; T.R. p. 63.)

(oo) If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant as to plaintiff's claim with respect to the place of work. (No. 45-A; T.R. pp. 63-64.)

(pp) There is a distinction between contributory negligence and negligence on the part of an employee which is the sole proximate cause of his injury or death. Contributory negligence is of importance in this case only if you find from all of the evidence that the defendant negligently failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work and that he suffered personal injury and death as a proximate result of such, if any, failure or

neglect. In such case, if you so find from the evidence, it is your duty to diminish the damages in proportion to the negligence, if any, on the part of Nathanael Patrick Hutchison proximately contributing to his own injury and death. On the other hand, if you find from all of the evidence that the sole proximate cause of the injury and death of Nathanael Patrick Hutchison was negligence on his part, then your verdict must be in favor of the defendant. (No. 46; T.R. p. 64.)

(qq) Nathanael Patrick Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger. In the absence of evidence, direct or indirect, to the contrary, the law presumes that he had notice of everything which an ordinarily careful seaman would have known under the same or similar circumstances. If Nathanael Patrick Hutchison did anything which an ordinarily prudent seaman would not have done under the same or similar circumstances or failed to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances then it will be your duty to find that Nathanael Patrick Hutchison was guilty of negligence. If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff. (No. 47; T.R. pp. 64-65.)

(rr) The law does not permit you to guess or speculate as to negligence or as to the proximate cause of the injuries or death of Nathanael Patrick Hutchison. If the evidence on the issue of claimed negligence on the part of the defendant or proximate cause does not preponder-

ate in favor of the plaintiff, then she has failed to fulfill her burden of proof. If after considering all of the evidence you find that it is just as probable that either the defendant was not negligent or that, if it was, its negligence was not a proximate cause of the injuries or death, as it is that some negligence on its part was such a cause, then a case against the defendant has not been established. (No. 49; T.R. pp. 65-66.)

(ss) In determining whether negligence or proximate cause or contributory negligence has been proved by a preponderance of evidence, you must consider all of the evidence, direct or indirect, bearing either way upon the question, regardless of which party produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. (No. 51; T.R. p. 66.)

(tt) There was no duty on the part of the defendant to anticipate or provide against a negligent, careless or improper use of any safety appliance or a failure on the part of any seaman to exercise ordinary care in or about the use of any safety appliance actually installed about the ventilator shaft. (No. 54; T.R. p. 68.)

(uu) In the instructions which have been given to you and in some which may be given to you the phrase "reasonably safe" is used. A safety appliance is reasonably sufficient in the event it is one which in and of itself would be deemed adequate by an ordinarily prudent employer under the same or similar circumstances. (No. 56; T.R. pp. 69-70.)

(vv) An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is all

that an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case. (No. 57-A; T.R. p. 70.)

(ww) You are instructed that the "Linfield Victory" was owned by the United States of America, Department of Commerce, and that it was a "steam vessel". An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life.

The applicable statute enacted by Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also provided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of said statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard obeyed the requirements of said statute. Unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to such presumption. (No. 58-A; T.R. pp. 73-74.)

(xx) You are instructed that regardless of the fact that the "Linfield Victory" was moored to or tied up at a dock at Baltimore, Maryland, on April 24, 1951, the said vessel was in navigation. (No. 59; T.R. pp. 74-75.)

(yy) You are instructed that regardless of the fact that the "Linfield Victory" was moored or tied to a dock at Baltimore, Maryland, on April 24, 1951, said "Linfield Victory" was at said time being used in navigation as a steamer; and it is a presumption of law in accordance with which you are bound to find, unless controverted by other evidence, direct or indirect, that the Coast Guard had carefully inspected the hull of said vessel and had satisfied itself that said vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she might be used in navigation with safety to life and that all requirements of law were faithfully complied with and that it did not find on board said vessel, as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law. (No. 60; T.R. p. 76.)

(zz) You are instructed that there is no obligation resting upon the defendant in this case to produce either in person or by deposition the testimony of any person who may have been aboard the vessel SS "Linfield Victory" at any time while the said vessel was in the Port of Baltimore, Maryland, for any purpose whatever. You are not entitled to presume or infer that if the defendant had produced, either in person or by deposition, the testimony of any person who may have been aboard the vessel "Linfield Victory" while it was in the Port of Baltimore, Maryland, or any other person who was in the City of Baltimore, Maryland, at any time while the said vessel was at that port that such testimony would constitute any evidence whatever in favor of the plaintiff's claim that the defendant failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work or that the life of Nathanael Patrick Hutchison could have been saved by a surgical operation or any other kind of medical care and attention. (No. 66; T.R. pp. 80-81.)

Appellant's objections to the instructions given and refused are in four sections. The first section refers to what occurred on the morning of October 13, 1955, before the court had given any of its instructions to the jury; the second section refers to what occurred immediately after the court concluded its first effort to instruct the jury; the third has reference to amendments before the jury started its deliberations; and the fourth section refers to what occurred when the jury came back to the court room, of its own volition, in an obviously confused, rebellious and sympathetic state of mind.

First section: On Thursday morning, October 13, 1955 (the court instructed the jury the next day, October 14, 1955) the record shows the following:

“Mr. Gallagher. In an effort to be helpful to the court, I will state now that I see no reason whatever why the court should not be able to state to the jury all of the law applicable to this case orally, without reading any instruction proposed by either of the parties. And the court will do that if the court will keep in mind the essential bases of actionable negligence.

No. 1. What duty is imposed by law upon the defendant Pacific-Atlantic Steamship Co. with reference to the allegations in the first amended complaint.

In other words, directed to those averments of the first amended complaint.

No. 2. After stating the legal duty, for example, your Honor should tell the jury what legal duty was imposed upon the defendant and upon what agent of the defendant to provide proper medical care for Mr. Hutchison.

I think the only agent of the defendant who could be charged with the performance of that duty, if it arose at all, was the master of the vessel.

Next, your Honor should tell the jury what the issues of fact are, as raised by the pleadings. Those issues are simple. There is a specific allegation with reference to alleged negligence, in a failure or neglect to supply sufficient safety appliances in and about the ventilator shaft and in masthouse No. 2, to provide a reasonably safe place to work.

Next, as the plaintiff claims—in *making these suggestions I am not agreeing these issues should be submitted to the jury*. Next, she claims that as a proximate result of the same alleged negligence, in the omission to do a certain thing with reference to safety appliances, Nathanael Patrick Hutchison, during his lifetime, suffered conscious pain and suffering.

Now, as a corollary, counsel says he also claims that a failure to conduct a search was negligence. I don't know

what your Honor is going to do with that, but I think you have got to tell the jury that there was or was not a legal duty to search for him simply and solely because of the fact that he didn't show up for work. I don't think there was any such legal duty.

Then your Honor will have to instruct the jury about what constitutes negligence on the part of the deceased.

In other words, tell the jury with reference to him, and referring to him, that negligence is the doing of something which an ordinarily prudent seaman would not have done, or the failure to do something which an ordinarily prudent seaman would have done, under the same or similar circumstances.

And that if he was so guilty of negligence, and it was the sole proximate cause of his injury, then, with reference to the claims for conscious pain and suffering, and with reference to the damages for death there is no cause of action and the verdict would have to be for the defendant.

However, if the jury finds, in response to your other instructions, the defendant did negligently breach some duty it owed to Mr. Hutchison or to Mrs. Hutchison, and that as a proximate result thereof his death occurred, and so forth, and he was guilty of contributory negligence, then the jury would have to diminish the damages in accordance with the percentage with respect to which his negligence proximately contributed to his injuries.

I don't think your Honor should have any trouble with injuries, with reference to the measure of damage, if they are couched in language which does not convey to the jury the idea that your Honor is assuming that the lady is entitled to recover any damage.

Now, there are other subjects that your Honor, I suggest, should cover clearly. No. 1. The statutes of the United States impose certain specific duties upon the

Coast Guard with reference to the inspection of vessels. I have called the statutes to your Honor's attention.

I think you should instruct the jury that the law required the Coast Guard to do thus and so, insofar as the statute is applicable to safety of life and so forth.

And that your Honor should tell the jury that in the absence of evidence, direct or indirect, to the contrary, the jury must find in accordance with the presumption that the Coast Guard performed its full, official duty in that respect before issuing a certificate of inspection.

I think that your Honor should also cover this question of illumination in the masthouse, to tell the jury that unless the plaintiff has proved that the inside of the masthouse on the date and at the time when Mr. Hutchison got into this ventilator shaft was so lacking in visibility as to make it necessary to have artificial illumination, and that unless the plaintiff has proved that they will disregard all of this testimony about no permanently affixed electrical fixtures.

Now, there is one other thing that I should call to your Honor's attention. I don't believe that your Honor should give the jury a general definition of negligence, because that would permit the jury to wander throughout the length and breadth of negligence generally, and they would not be confined to the averments of the complaint setting forth Mrs. Hutchison's specific claims of negligence, as denied by the answer.

And there is a case—there are a lot of cases, but there is one in 216 Fed. (2d) which holds that it is the duty of a United States District Judge to confine instructions, with reference to negligence, to the specific allegations which are set forth in the complaint, and not give some general definition of negligence which would permit the jury to say, "Oh, well, I think the president of the corporation should have been in Baltimore and I think the

defendant corporation should have had somebody leading this man around by the hand all day," and they didn't have one leading him around by the hand and therefore, they are guilty of negligence and so forth.

That is why I think that these instructions should be restricted to the issues raised by the allegations of the complaint and denied by the defendant.

The Court. They will be.

Mr. Gallagher. Now, one other thing. The only possible causes of action which this plaintiff might have are strictly and exclusively statutory. And those causes of action are separate and distinct and, therefore, there must be a separate verdict as to each cause of action.

The Court. There will be.

In fact, I have decided that, generally speaking, the interrogatories I worked out at the earlier trial were a good idea. Many of the suggestions of the interrogatories you proposed here are good, but they have become lengthy before you finished with them, so I will stay down this evening and work out a set of interrogatories which will require this jury to state whether they find negligence, whether they find contributory negligence, or whether they find proximate cause, whether they find conscious pain and suffering, and if they do so find it, what they allow for it.

Mr. Gallagher. I have asked for one, your Honor, which this jury can't answer, but it is a material issue in the case. What date and what time on what date did Nathanael Patrick Hutchison hit the bottom of that ventilator shaft and suffer his injuries?

If the jury can't answer that question, they can't say there was any negligence in failing to find him or failing to send him to a doctor, and they can't say that he suffered them in the course of his employment, in the absence of their ability to make that kind of a finding.

See, your Honor, there is no evidence in this case showing how this man was dressed when he was found. Was he in dress clothes, was he in working clothes? (R.T. pp. 602-607; T.R. pp. 358-363.)

The foregoing suggestions and contentions of defendant's attorney were thus called to the attention of the court before the jury retired to consider its verdict and constitute objections to the charge as actually given.

Second section:

(a) Mr. Gallagher. I except to the instruction wherein the court told the jury that the fact that the United States has or had an interest in the vessel LINFIELD VICTORY does not affect the responsibility of the defendant upon the following grounds:

No. 1—

The Court. I don't care what grounds you state. I am going to let the charge in that respect stand, in view of my research on it and in view of the argument which we have heretofore had.

Your exception is sufficient for the purpose of this court.

Mr. Gallagher. I respectfully request permission to state it for the benefit of the United States Court of Appeals.

The Court. They will know what you are getting at. (R.T. p. 799; T.R. pp. 529-530.)

(b) Mr. Gallagher. I except to the instruction given by the court that the operators of the LINFIELD VICTORY are responsible for the physical structure of the ship and have placed upon them any burden to change the physical structure of the ship upon the ground that the charter party prohibits it, without the consent and permission of the Government, the owner. (R.T. pp. 799-800; T.R. p. 530.)

(c) Mr. Gallagher. I except to the giving of the instruction with reference to presumptions, because the

court has not told the jury that they are not entitled to indulge in any presumptions excepting those specifically referred to by the court. (R.T. p. 800; T.R. pp. 530-531.)

(d) Mr. Gallagher. I except to the instruction given by the court that any party who intends to deny the effect of a presumption must present evidence to the contrary. (R.T. p. 800; T.R. p. 531.)

(e) Mr. Gallagher. I except to the instruction that the court gave to the jury with reference to the Certificate of Inspection, which has been introduced in evidence, wherein the court instructed with reference to questions of fact and deprived the defendant of its right to a jury trial. (R.T. p. 801; T.R. p. 532.)

(f) Mr. Gallagher. I except to the instruction with reference to your Honor's discourse on the Certificate of Inspection for another reason, that it ignores the testimony of the witness Dyer as to the extent of the inspection, and it ignores the presumption that official duty has been performed and that it is in itself evidence, because it is a disputable presumption, and the jury must find in accordance with it, in the absence of evidence direct or indirect, to the contrary. (R.T. p. 801; T.R. p. 532.)

(g) Mr. Gallagher. I except to the instructions given by the court for the reason that the court did not state to the jury the issues, the specific issues as raised by the pleadings and state to the jury that their consideration of the evidence is to be restricted to those specific averments of alleged negligence. (R.T. p. 802; T.R. p. 532.)

(h) Mr. Gallagher. I except to the instructions, the part of the instruction as follows:

"In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution or would

caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and may rely and act upon that assumption'' upon the ground that everything connected with the masthouse and the shafts, and so forth, was plainly obvious and there is no basis in the evidence for that instruction. (R.T. pp. 802-803; T.R. p. 533.)

(i) Mr. Gallagher. I take exception to the instruction that the fact that Nathanael Patrick Hutchison had not signed Articles at the time of receiving the personal injuries in no way deprives him of his right under the law, upon the ground that that instruction assumes as a fact that he had some right under the law. In other words, to collect damages.

The Court. Exception noted.

Mr. Gallagher. And the same exception is taken to the instructions given by the court with reference to Mrs. Hutchison's rights under the law. (R.T. p. 803; T.R. p. 833.)

(j) Mr. Gallagher. I except to the instruction of the court, "That in the event of injury Nathanael Patrick Hutchison was entitled to the rights which the court has referred to and will refer to in these instructions, unless he had actually left such employment, and whether or not he commenced employment or whether or not he left the employment are questions that are exclusively for the jury," upon the ground that that instruction calls the jury's attention to the assumption that Nathanael Patrick Hutchison had a legal right to recover.

The Court. I think he did, whether he was a member of the crew or not, if he were an invitee or even a licensee. (R.T. pp. 803-804; T.R. p. 534.)

(k) Mr. Gallagher. I except to the instructions of the court wherein the court defines negligence generally,

wherein the court refers to acts or omissions with reference to the defendant, upon the ground that the court has thereby expanded the issues and has not confined the jury to a consideration of specific alleged failures, which do not include any acts on the part of the defendant or its employees. (R.T. p. 804; T.R. p. 534.)

(1) Mr. Gallagher. I except to the instruction that negligence is the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do,—

The Court. Oh, that is Blackstone, Chitty and all the other people—

Mr. Gallagher. May I finish my exception, your Honor?

The Court. I read it from BAJI.

Mr. Gallagher. —upon the ground that the allegation so far as the defendant is concerned, relates solely to alleged omissions.

And unless the court says that that applies to Mr. Hutchison, but that only evidence which may show alleged omissions applies to the defendant, the instruction is prejudicial. (R.T. pp. 805-806; T.R. pp. 535-536.)

(m) Mr. Gallagher. I take exception to the remaining instructions which refer generally to negligence, without confining it to the particular and specific acts (sic) of alleged omissions set forth in the complaint, so far as the defendant is concerned. (R.T. p. 806; T.R. p. 536.)

(n) I except to the instruction given by your Honor with reference to the increase or decrease in the amount of care which must be exercised, because the court pointed that at the defendant and did not say that Nathanael Patrick Hutchison was required to do the same thing. (R.T. p. 806; T.R. p. 536.)

(o) Mr. Gallagher. I take exception to the instruction given by the court with reference to contributory

negligence, wherein the court told the jury that the only thing it could think of was the testimony with reference to the fact that he felt rugged and might have a slight hangover, upon the ground that that is an instruction with reference to fact which deprives the defendant of a right to a jury trial.

The Court. What other possible basis for contributory negligence is suggested by the evidence? Tell me and I will amend my comment to the jury.

Mr. Gallagher. If the man climbed over the pipe railings, in the full possession of his faculties, at a time when he could see what he was doing, then he was guilty of gross negligence, and such negligence would be the sole proximate cause of his injury and would, at least, be a proximate cause to a great extent.

He could have climbed up the escape shaft, as plaintiff claims, in utter darkness. If he did so he was guilty of gross negligence which would proximately contribute to his injuries, and so forth.

Those are not the only things he could have done or omitted. And I say that the court cannot tell the jury what is the extent of contributory negligence or what facts they can consider in determining that issue.

The Court. I can comment on the evidence.

Mr. Gallagher. I contend it is a violation of our constitutional right to a jury trial. (R.T. pp. 806-807; T.R. p. 536.)

(p) Now, I take exception to the instruction given by your Honor, where you told the jury that at the very time he suffered his personal injuries he was actively engaged in the course of his employment, or was in the course of his employment. (R.T. p. 807; T.R. p. 537.)

(q) Mr. Gallagher. I take exception to the instruction given by your Honor to the jury, wherein you stated specifically that it didn't make a particle of difference

what time this alleged accident occurred, for the reason that the course of the employment is a very essential issue here and the time is, therefore, of material importance and it is the burden of the plaintiff to prove that the injuries were suffered in the course of the employment and the time is a very material element in determining that factor. (R.T. p. 808; T.R. pp. 537-538.)

(r) Mr. Gallagher. I except to the refusal of the court to submit to the jury an interrogatory requesting the jury to state on what date Nathanael Patrick Hutchison suffered his injuries and at what time on such date. (R.T. p. 808; T.R. p. 533.)

(s) Mr. Gallagher. If your Honor please, the defendant takes exception to the refusal of the court to give its proposed Instruction No. 11 upon the ground that the matters covered by that instruction have not been covered by the instruction given.

The Court. Will you pass it up, please?

These go from 8 to—that is a hiatus; from 8 to 23.

Read me enough of 11, Mr. Gallagher, that I will have it recalled to my mind.

Mr. Gallagher. Your Honor, the subject of 11 is to set forth the issues of fact which the court is submitting to the jury, with reference to the claim of actionable negligence, and also tells the jury that there is no burden on the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in Plaintiff's Complaint, and that the averments of Plaintiff's Complaint do not constitute the slightest evidence. Those have not been covered by the instructions given. (R.T. pp. 809-810; T.R. pp. 539-540.)

(t) Mr. Gallagher. I take exception to the refusal to give defendant's proposed Instruction No. 11-A for the same reasons which I have referred to with respect to defendant's proposed Instruction 11. (R.T. p. 810; T.R. p. 540.)

(u) Mr. Gallagher. I take exception to the refusal to give proposed Instruction No. 13, which would have told the jury that they are not permitted to determine what issues of fact are raised by the pleadings. (R.T. p. 810; T.R. p. 540.)

(v) The Court. They haven't seen the pleadings in this case, nor will they. I read them the charging language.

Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 14-A, which—

The Court. What are the first words of it?

Mr. Gallagher. "The court will call to your attention certain specific averments set forth by the plaintiff in her Complaint."

The Court. All right, that is enough. Denied; noted. (R.T. p. 811; T.R. p. 540.)

(w) Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 15, which would have told the jury that there is no claim of the plaintiff to the effect that any appliance in the masthouse was defective and points out the specific claim which she does make. (R.T. p. 811; T.R. p. 540.)

(x) Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 15-A for the same reasons stated with respect to the refusal to give No. 15. (R.T. p. 811; T.R. p. 541.)

(y) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 16-A upon the ground that the principles of law set forth therein have not been covered by the instructions given by the court.

The Court. Will you read me the first words of 16-A?

Mr. Gallagher. "There is no averment set forth in plaintiff's complaint that the defendant negligently or

otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2.”

The Court. Noted and denied. When I said “noted” I mean it is noted for your purpose on appeal.

When I say “denied”, I mean I refuse to read it to the jury now, for all reasons which are legally applicable to such refusal. (R.T. pp. 811-812; T.R. p. 541.)

(z) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant’s proposed Instruction No. 17 upon the ground that it states principles of law, which have not been covered, and as to which the defendant is entitled to have the jury instructed.

The Court. The first words, please.

Mr. Gallagher. “Insofar as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides,—”

The Court. Denied. Noted and denied. It is covered by other instructions. (R.T. p. 812; T.R. pp. 541-542.)

(aa) Mr. Gallagher. I respectfully except to the court’s refusal to give defendant’s proposed Instruction No. 18 upon the same grounds and each of them heretofore stated. (R.T. p. 813; T.R. p. 542.)

(bb) Mr. Gallagher. I except to the refusal of the court to give defendant’s proposed Instruction No. 66, which has to do with the—

The Court. All right. I think I have that one here. It was filed in sequence.

Mr. Gallagher. In the light of the argument made by Mr. Simpson to the jury, that it was our obligation to bring in some witnesses, the refusal to give that instruction is particularly prejudicial. (R.T. p. 813; T.R. p. 542.)

(cc) Mr. Gallagher. The defendant respectfully excepts to the refusal of the court to instruct the jury

with reference to what would constitute negligence on the part of the deceased himself. (R.T. p. 813; T.R. p. 542.)

(dd) Mr. Gallagher. The defendant respectfully excepts to the refusal of the court to instruct as requested in No. 28, that a seaman has a right, under certain circumstances, to quit his job at any time he may see fit to do so. (R.T. p. 813; T.R. pp. 542-543.)

(ee) Mr. Gallagher. I take exception to the refusal of the court to give proposed Instruction No. 30-A upon the ground that that would tell the jury what is actually within the—an act within the course of employment and would restrict the jury to the proposition that if the plaintiff doesn't prove that particular element by a preponderance of evidence that she could not claim that there was any failure to furnish a reasonably safe place to work, or that he was actually engaged in the course of his employment. (R.T. p. 814; T.R. p. 543.)

* * * * *

The Court. Read enough of it that I can see if it has legal vice in it.

Mr. Gallagher. "A seaman does not suffer a personal injury in the course of his employment, unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer, or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment."

The Court. Covered by instructions given. Noted and denied. (R.T. p. 815; T.R. p. 544.)

(ff) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 31, or in lieu thereof 31-A, which has to do—

The Court. Just a moment, until I find it here. Noted and denied.

Mr. Gallagher. I respectfully except to the refusal of the court to give the proposed defendant's instructions with reference to foreseeability as being one of the essential elements of actionable negligence. In other words, Nos. 32, 32-A, 33, 34, 35, 35-A, 36, 36-A and—that is it. 36-A is the last one. Upon the ground that your Honor has not fully or correctly instructed the jury with reference to foreseeability. (R.T. pp. 815-816; T.R. p. 544.)

(gg) Mr. Gallagher. I respectfully except to the refusal of the court to instruct the jury, as requested by the defendant, that the pipe railings surrounding the ventilator shaft were, as a matter of law, a safety appliance. (R.T. p. 816; T.R. p. 545.)

(hh) Mr. Gallagher. I respectfully except to the refusal of the court to instruct the jury that there was no duty on the part of the defendant to furnish an appliance which would be reasonably safe for any seaman, unless such seaman was exercising ordinary care for his own safety and preservation, in the use thereof, or in the vicinity thereof. (R.T. p. 816; T.R. p. 545.)

(ii) Mr. Gallagher. I respectfully take an exception to the refusal of the court to instruct the jury in accordance with defendant's proposed Instruction No. 52, to the effect that from the disputable presumption favoring Mr. Hutchison the jury could not infer or presume any negligence on the part of the defendant. (R.T. p. 816; T.R. p. 545.)

(jj) Mr. Gallagher. I except to the refusal of the court to instruct the jury that the law did not impose upon a defendant an absolute duty of furnishing an accident-proof ventilator shaft, or that the masthouse had to be absolutely safe, to the end that it was impossible for a seaman to be injured. (R.T. pp. 816-817; T.R. p. 545.)

(kk) Mr. Gallagher. I respectfully except to the refusal of the court to give the defendant's proposed instruction to the effect that the defendant isn't guilty of actionable negligence merely because it fails to anticipate carelessness or lack of care upon the part of an employee. (R.T. p. 817; T.R. pp. 545-546.)

(ll) Now, Mr. Gallagher, you are going through, apparently all of your instructions and taking time to enumerate things we have been over before.

You have gone substantially past the time and it looks as if you carry on the way you are, you are going to take the full hour that you told me you were going to take.

Mr. Gallagher. We can shorten it.

The Court. *You are not going to run this courtroom. Proceed rapidly, expeditiously.*

Mr. Gallagher. May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and that anything which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, "May I have a general exception upon the ground that the court committed error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court"?

The Court. A general exception is noted.

Mr. Gallagher. That is satisfactory to your Honor?

The Court. Yes.

Mr. Gallagher. Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court. I do not. (R.T. pp. 817-818; T.R. pp. 545-547.)

Third section:

(a) Now, as to exceptions to the further statement of the court to the jury, after they have returned following the statement of original exceptions, approach the bench, if there are any.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

The Court. You don't have to re-state them all over again, but just what I said, did I say anything wrong?

Mr. Simpson. No exception, your Honor.

Mr. Gallagher. The defendant has no exception to what your Honor has stated here, but does not withdraw the exceptions which it has already stated and is not satisfied with the instructions, as a whole, at this time. (R.T. p. 822; T.R. p. 550.)

Fourth section:

(a) Mr. Gallagher. Your Honor, may I point out that under the Federal Rules of Civil Procedure, while it is permissible to say "first cause of action, second cause of action" and so forth, there are cases which hold that if you set forth separate claims in separate paragraphs that is all that is required.

Of course, you have got to allege a fact showing some proximate causal connection between what you do allege and what you do claim.

Assuming, without conceding, there are inferred facts sufficient to show plaintiff is entitled to relief on the theory that this was a negligent failure to search for him, and that such negligent failure proximately contributed to his death. That would be separate and distinct entirely from the cause of action which is predicated upon the condition of the masthouse appliances.

Therefore, as I have contended and do now contend, if the Court submits that theory to the jury, which I don't think the Court should, the Court must submit separate forms of verdict and have them labeled so we will know what the jury has done. Otherwise, the defendant would

be deprived of its property without due process of law, in that there is no finding with reference to that particular alleged cause of action. (R.T. pp. 849-850; T.R. pp. 568-569.)

(b) The defendant excepts to the instructions which your Honor has given to the jury since they came down this evening upon the ground that these instructions given to the jury are argumentative. They are not confined to the statement of principles of law applicable to the case.

They do not cover the issues which the Court purported to state to the jury. The Court refers to negligence and so forth and so on, but they are, I think, unfair to the defendant.

The Court keeps constantly referring to the fact that this poor widow has lost her husband and she has sustained a monetary loss, and so forth and so on. (R.T. p. 851; T.R. pp. 569-570.)

(c) Mr. Gallagher. Now, this question reads as follows:

“Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?”

Now, I respectfully submit that that question should be answered categorically. The answer is either yes or no.

The question should be read to the jury and the answer given. I think the only possible answer that you should give to that interrogatory is yes. *And they should be instructed to disregard what you have said.*

The Court. I will not instruct them to disregard anything I have said. It has all been the law. (R.T. pp. 852-853; T.R. p. 571.)

35. The Court erred in refusing to submit to the jury a separate and distinct verdict form with respect to the averments in paragraph IX of the first amended complaint or special interrogatories with respect to said averments,

particularly in view of the fact that after the trial judge had erroneously permitted the plaintiff to introduce evidence on the subject of the failure to search for and discover Hutchison, had instructed the jury thereon, and had permitted this extraneous matter to soak into and prejudicially influence the minds of the jurors, he belatedly stated, at almost 11:00 p.m. on the last day of the trial, after the jurors had been deliberating since 1:00 p.m. of said date, that the averments of said paragraph IX were "thrown in, so far as reading the complaint is concerned, as kind of a gratuitous observation that they were a callous employer" and "it is not alleged any damages flowed from the failure to find him." (R.T. pp. 843-851; T.R. pp. 562-567.) The record affirmatively shows that at least some of the jurors were rebellious to the extent that they wanted to base a verdict on the death claim upon the evidence with respect to the failure to search for and discover Hutchison before he died. (R.T. p. 843; T.R. p. 562.)

IV.

ARGUMENT.

- (a) **THE COURT ERRED IN ITS ORDERS, DECISIONS, ACTIONS AND RULINGS WITH RESPECT TO IMMATERIAL AND IMPERTINENT MATTER CONSISTING OF THE AVERMENTS IN PARAGRAPH IX, FIRST AMENDED COMPLAINT; THERE WAS PREJUDICIAL IRREGULARITY IN THE PROCEEDINGS, ACTS AND CONDUCT OF THE COURT, JURY AND APPELLEE'S ATTORNEY IN CONNECTION THEREWITH; AND APPELLEE'S ATTORNEYS WERE, AND EACH THEREOF WAS, GUILTY OF PREJUDICIAL MISCONDUCT IN RESPECT THEREOF.**

The assigned errors involved here are: 1, 2, 3, 4, 6, 13, 20, 31 and 35.

Said assignments are, and each thereof is, by reference thereto incorporated herein as part of appellant's argument in support thereof.

1. Approximately three years before the last trial, on October 10, 1952, appellant filed its written motion to strike paragraph IX from the pleading. (T.R. pp. 8-9.) By reference thereto, appellant incorporates herein the said written motion in its entirety; and by said incorporation adopts as part of its argument on appeal the contents thereof.

2. At the close of the evidence offered by the appellee, appellant orally moved to exclude from the consideration of the jury, in any event, the issue raised by the averments of paragraph IX. (R.T. pp. 398-399; T.R. pp. 297-298.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

3. At the close of the evidence offered by the appellee, appellant orally moved to dismiss paragraph IX upon the ground that it does not aver facts sufficient to show that the plaintiff is entitled to relief. (R.T. pp. 411-415; T.R. pp. 304-305.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

4. At the close of the evidence offered by the appellee, appellant orally moved for a directed verdict with respect to the averments of paragraph IX. (R.T. pp. 411-415; T.R. pp. 304-308.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

5. At the close of all the evidence, appellant orally moved to strike Crawford's testimony with respect to the subject matter averred in paragraph IX. (R.T. pp. 575-

576; T.R. p. 336.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

6. At the close of all the evidence, appellant orally moved for a directed verdict with respect to the "claim" set forth in paragraph IX. (R.T. pp. 576-577; T.R. pp. 336-337; R.T. pp. 581-586; T.R. pp. 336-346.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

7. When it was made to affirmatively appear, during the deliberations of the jury, that at least some of them wanted to base a verdict against appellant upon the subject matter of paragraph IX, appellant orally moved that the Court submit a separate form of verdict and/or special interrogatories in respect of the subject matter of paragraph IX. By reference thereto, appellant incorporates herein the following oral proceedings: (R.T. pp. 845-847; T.R. pp. 564-567; R.T. pp. 849-851; T.R. pp. 567-569) and by said incorporation adopts as part of its argument on appeal the contents thereof.

(a-1) The court committed prejudicial error in denying the written motion to strike paragraph IX.

It is an absolute certainty that an actual failure, negligent or otherwise, to search for and discover N. P. Hutchison in the bottom of the ventilator shaft could not have proximately caused or proximately contributed to the personal injuries, characterized as "devastating and permanent", suffered at the time he came in contact with the bottom of said shaft. It is also elementary that negligence is immaterial and impertinent unless it proximately causes

or proximately contributes to injury and damage. (*Brady v. Southern Ry. Co.*, 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239; *A. T. & S. F. Ry. Co. v. Saxon*, 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397.)

If, which it does not, paragraph IX contained averments showing the existence of the element of proximate causal connection, thus showing *actionable* negligence, *provided* it survived the death, this would be a subsequent and distinct tort which would have to be pleaded. (*Union Oil Co. of California v. Hunt*, 111 F.2d 269-277.) Appellant is *not* assuming or conceding, by the foregoing, that the subject matter of paragraph IX is or could be a right of action given by any part or portion of Chapter 2, F.E.L.A., or survives pursuant to § 59, 45 U.S.C. Appellant contends to the contrary.

Rule 8, F.R.C.P. provides that each averment of a pleading which sets forth a claim for relief "shall be simple, concise and direct"; the sum total of which must result in "a short and plain statement of the claim showing that the pleader is entitled to relief." The matter averred in paragraph IX does not meet this simple test. It is obviously immaterial and impertinent to the right of action for damages by reason of conscious pain and suffering given by §§ 1 and 9, Chapter 2, F.E.L.A., 45 U.S.C., §§ 51, 59. It is also impertinent and immaterial to the right of action for damages by reason of death. Therefore, the motion to strike the same from the pleading pursuant to Rule 12(f), F.R.C.P., should have been granted.

(a-2) The remaining assigned errors in respect of this subject are inter-related and are therefore properly presented together.

With presumed knowledge of the elementary principle of torts that a negligent act or omission is not actionable unless such act or omission proximately causes damage,

appellee's attorneys *wrongfully* inserted in the first amended complaint the averment "That defendant * * * and its employees were further negligent in failing to search for and discover (N. P. Hutchison) in *said injured condition* until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania." (Par. IX, First Amended Complaint, T.R. p. 6.) They deliberately, craftily and cunningly omitted an averment that the alleged negligence proximately caused or contributed to any personal injury or to any conscious pain and suffering or to the death of N. P. Hutchison. Why did they omit, in this respect, the averments of proximate causal connection which they were so careful to include with respect to the original injuries and the death? Was it because they knew that the *non-statutory* general maritime law right of action available to a *living* seaman arising out of a *negligent* failure of the *master of a vessel* to provide all reasonably required and available medical, surgical and hospital care to a seaman who has *theretofore* suffered serious injury *while actually engaged in the service of the ship* is based upon a tort which is *entirely distinct and subsequent in time and nature* with respect to a tort, if any, which proximately caused the *original* injuries? Or was it because they were fearful of the proposition that if they averred facts showing such proximate causal connection, the trial court would be compelled—if it was of the opinion that such *non-statutory* right of action survived the death; or that it could be the basis of a verdict in favor of appellee on the claim arising out of the death—to submit separate forms of verdict with respect thereto? If this had been done a jury might, if instructed that it *could* do so, have returned two verdicts in favor of the appellant on the basis of a finding that there was no negligent failure to supply sufficient safety appliances in

and about the ventilator shaft to provide a reasonably safe place in which to work; and two verdicts against the appellant on the "negligent failure to search for and discover" theory. If this had been the result, the "fat would be in the fire" unless the latter theory is based upon a *statutory* right of action, *given* by Chapter 2, F.E.L.A. (45 U.S.C., § 59.)

The record demonstrates that the appellee had no evidence which would make out a *prima facie* case of actionable negligence, statutory or otherwise, on the theory that a negligent failure to search for and discover N. P. Hutchison while he was alive proximately caused or proximately contributed to any conscious pain and suffering or to his death. Her attorneys were guilty of shocking and prejudicial misconduct in injecting this extraneous, impertinent and immaterial issue into the pleadings, evidence and argument to the jury. It was a clear and inexcusable violation of the spirit, if not the letter, of Rule 11, F.R.C.P. No clearer characterization of that misconduct is needed than the statement of the trial court, *amazing* in the sense that he had knowingly permitted and aided in causing the minds of the jurors to become saturated with this prejudicial appeal to passion—as follows: "*It is thrown in, so far as reading the complaint is concerned, as kind of a gratuitous observation that they were a callous employer, * * *.*" (R.T. p. 848; T.R. p. 567.) That was the sole and exact reason for the injection of said subject matter into the minds of the jurors. Appellant, just as much as the appellee, was entitled to a *good climate* in which to have its rights protected by a fair and impartial jury. This subject was forcefully injected for the illegitimate *psychological* effect it would exert on the minds of the jurors in boosting the appellee's *weak and emaciated* case "over the top". None of this could have occurred if the trial court had granted appellant's written motion,

filed, presented and denied on October 10, 1952. (T.R. p. 10.) Said motion was based upon Rule 12(f), F.R.C.P., pursuant to which "upon motion made by a party before responding to a pleading * * * the Court may order stricken from any pleading any * * * immaterial" or "impertinent * * * matter." The ruling denying said motion was prejudicial error. The trial court condemned its own prior rulings with respect to this subject by its obviously correct but belated characterization thereof, after all the harm had been done; and thereby also affirmatively indicated its lack of impartiality as between the respective parties. It is elementary that one of the essential requisites of due process of law as guaranteed to all litigants pursuant to Amendment V, U.S. Constitution, is an absolutely impartial court.

The Jones Act adopts, by reference thereto, all statutes of the United States *modifying or extending the common-law right or remedy* in cases of personal injury to employees of common carriers by railroad engaging in interstate or foreign commerce, while such railway employees are employed in such commerce; and provides by direct, concise and clear language that in any action maintained by a seaman who shall suffer personal injury *in the course of his employment* said statutes *shall* apply. (45 U.S.C., § 688.) The adopted statutes modify the theretofore existing common-law right or remedy applicable to the relationship of employer-employee in respect of tort actions by eliminating the fellow-servant doctrine, and the defense of contributory negligence; substituting for the latter the theory of comparative negligence. They also eliminate the defense of assumption of risk in any case where the injury "resulted in whole or in part from the negligence of any of the *officers, agents, or employees* of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such

common carrier of any *statute* enacted for the safety of employees contributed to the injury of such employee.” (45 U.S.C., §54.)

Said statutes, adopted by reference thereto in the Jones Act, also *extend* the theretofore existing common-law remedy with respect to the recovery of damages by reason of personal injuries suffered *in the course of the employment* by providing in § 59, 45 U.S.C. (a part of Chapter 2 of the Federal Employers’ Liability Act) that “Any *right of action* given by *this* chapter to a person *suffering injury* shall *survive* to his or her personal representative for the benefit of the surviving widow * * *.”

There are two *non-statutory* rights of action created by case-made admiralty and maritime law of the United States pursuant to which a *living* seaman may recover damages by reason of personal injury.

(1) If he suffers injury in the service of the ship as a proximate result of its unseaworthiness or a failure to supply and keep in order the appliances appurtenant thereto, he has a right of action, regardless of fault or the absence thereof on the part of the employer or any of its agents or employees, pursuant to which he may recover all damages proximately resulting from the breach of warranty of seaworthiness. The liability of the employer is absolute. It is not, however, a common-law right or remedy. It does *not* survive the death of the injured seaman.

(2) If *subsequent* to suffering a personal injury *in the course of his employment* (e.g. while engaged in any activity required in the performance of the duties pertaining to his particular position as a member of the crew; or is doing anything which is in any manner incidental to his required duties (*Sundberg v. Washington Fish & Oyster Co.*, 138 F.2d 801; *Wong Bar v. Suburban Petroleum Transport*, 119 F.2d 745) the master of the ship, who is

the *agent* of the common employer for *this* purpose, negligently fails to provide all reasonably *required and available* medical, surgical and hospital care and the *original* injuries suffered *in the course of the employment* are *aggravated* as a proximate result thereof, the seaman has a right of action pursuant to which he may recover damages proximately resulting *solely* from the aggravation. No damages by reason of whatever disability and pain are *the sole proximate result* of the *original* injury may be recovered in *this* non-statutory right of action. (*Union Oil Company v. Hunt*, 111 F.2d 269-277.) This right of action does *not* survive the death of the seaman. It is not based upon a personal injury suffered by the seaman *in the course of his employment*. There can be no personal injury suffered in the course of the employment, in any event, unless the conventional relationship of employer and employee is in force and effect at the very time of injury.

The duty to provide medical, surgical and hospital care when required and available arises out of the fact that the personal injuries were sustained while the contract of employment was in full force and effect. The fact that this duty must be performed after the termination of the contract will not support a conclusion that the conventional relationship of employer and employee continues to exist so that any additional injury suffered by a negligent failure to provide any care or inflicted by negligent action in the course of actual attempted treatment is a personal injury suffered *in the course of the seaman's employment*.

There is only *one* right of action given by any part of Chapter 2, Federal Employers' Liability Act, to a person suffering injury. That right of action is given by section 1, Chapter 2 of said Act. (35 Stat. 65; 45 U.S.C., § 51.) The sole and exclusive legislative authority of the Congress to create such right of action is derived from and

limited by its constitutional power (Art. I, Section 2, Clause 3) "To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." (*In Re Second Employers' Liability Cases*, 32 S.Ct. 169, 223 U.S. 1, 56 L.Ed. 327.) The only part of "the statutes of the United States modifying or *extending* the *common-law* right or *remedy* in cases of personal injury to railway employees" (41 Stat. 1007, 46 U.S.C., § 688) which has anything to do with the *survival* of a right of action in respect of personal injury is § 9, 36 Stat. 291, 45 U.S.C., § 59. This section provides that "Any *right of action* given by *this* chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow" etc., "but in such cases there shall be only *one* recovery for the *same* injury." *Expressio unius est exclusio alterius*.

The essential and *exclusive* factual bases of the *statutory right of action* for *injury* given by Chapter 2, F.E.L.A., the *concurrence* of all of which are necessary conditions precedent thereto, are the following:

1. The employer must be a *common* carrier engaging in interstate or foreign commerce.
2. The employee must suffer injury while he is employed by such carrier in such commerce.
3. The injury must be one "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Appellant contends that the said right of action is incontrovertibly and exclusively statutory; and that said statutory right of action is the *only* right of action which survives to the personal representative of a seaman who has suffered "personal injury in the course of his employ-

ment." *Non-statutory*, general maritime law rights of action arising *ex contractu* or *ex delicto* as a result of personal injury are not within the orbit of § 9, F.E.L.A., 45 U.S.C., § 59. The Jones Act is quite clear on the intention of the Congress in this respect. It is therein specified that "any seaman who shall suffer personal injury *in the course of his employment* may * * * maintain an action for damages * * * and in *such* action all *statutes* of the United States *modifying or extending* the common-law right or remedy in cases of personal injury to *railway employees shall apply*." (41 Stat. 1007, 46 U.S.C., § 688.) *Expressio unius est exclusio alterius*.

With the exception of the absence of an averment showing that the appellant was a *common* carrier engaged in interstate or foreign commerce at the time Hutchison suffered the injuries from which he died (*jurisdictional* requisites), and that Hutchison was employed in such commerce, the first eight paragraphs of the first amended complaint contain averments which, if admitted or proved, show that the pleader is entitled to relief on the basis of the survival of the right of action for injury given by the first section of chapter 2, F.E.L.A. Such statutory survival right of action would accrue and become vested in the personal representative at the instant of death. The measure of damage is the pecuniary value of *all* conscious pain and suffering proximately resulting from *the* personal injury suffered *in the course of employment*. It is not permissible to attempt to split the said conscious pain into various parts and set up separate counts or claims based thereon. Pain is an element or item of *damage* proximately resulting from an original tort. It is indivisible in the sense that a litigant cannot contend that each interruption and subsequent recurrence of actual pain will constitute a new basis of actionable negligence. *If* N. P. Hutchison suffered *any* injury *in the course of*

his employment, such injury was suffered when he struck the bottom of the ventilator shaft. The *proximate* result or results of such injury cannot be divided into separate and successive parts or rights of action.

Appellant contends that while Hutchison was lying at the bottom of the ventilator shaft during the period of time which elapsed between the instant he suffered the “devastating and permanent personal injuries” and his death, he was *not acting in the course of his employment*; and, therefore, could not during that interval of time have suffered any personal injury *in the course of his employment* as a seaman. It would be illogical to suggest that he was then engaged in the performance of any personal service or doing any other act or thing within the requirements of or in any manner incidental to his duties as a seaman and member of the crew. In the absence of at least one of these alternatives he was not acting in the course of his employment. (*Thompson v. Eargle*, 182 F.2d 717; *Sundberg v. Washington Fish & Oyster Co.*, 138 F.2d 801; *Wong Bar v. Suburban Petroleum Transport*, 119 F.2d 745; *The Norland*, 101 F.2d 967; *States S.S. Co. v. Borglann*, 41 F.2d 456; *Griffin v. I.A.C.*, 19 C.A.2d 727, 66 P.2d 176; *Adams v. American President Lines*, 23 C.2d 681, 146 P.2d 1; *Desper v. Starved Rock Ferry Co.*, 72 S.Ct. 216, 342 U.S. 187, 96 L.Ed. 205.) In addition, it is obvious that he could not have been, during that period, subject to any call to duty.

The personal injuries suffered by N. P. Hutchison consisted of extensive linear fractures of the skull and some serious injury to the brain which resulted in a subdural hemorrhage. (R.T. pp. 255-258; T.R. p. 256.) Appellant contends that when it becomes *impossible*, by reason of “devastating and permanent personal injuries” for an employee to perform *any* part or portion of the personal services for which he was engaged, the conventional rela-

tionship of employer-employee is *terminated*. (35 Am. Jur. p. 465; Anno. 21 A.L.R. 2d 1247.) The actual existence of this relationship at the precise time of suffering a personal injury is an essential requisite of a right of action under the Jones Act. (*Cosmopolitan Shipping Co. v. McAllister*, 69 S.Ct. 1317, 337 U.S. 783, 93 L.Ed. 1692; *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F.2d 843, cert. den. 74 S.Ct. 429, 347 U.S. 904, 98 L.Ed. 1063; *The Norland*, 101 F.2d 967.)

Appellant was entitled to a good climate in which to try the case. The record affirmatively shows that after the jurors had been deliberating from approximately 2:00 p.m. (after returning from lunch on October 14, 1955) until 10:23 p.m., some of them were not willing to return a verdict in favor of appellee on the claim for damages by reason of the death upon the basis of a finding in favor of appellee in respect of the averred negligent omission set forth in paragraph VIII, but wanted to do so on the theory that the failure to search *in the ventilator shaft* and *discover* N. P. Hutchison before he died was the proximate cause of his death. (R.T. p. 843; T.R. p. 562.) *Before* the jurors had deliberated they were told by the trial court that they could not do this. (R.T. pp. 784-785; T.R. p. 517.)

The prejudicial effect of evidence with respect to a matter no part of which is specifically, precisely, or definitely relevant and material to a genuine issue of *actionable* negligence cannot be denied. "It is fundamental that evidence must be relevant to the issues in a case before it can be admitted. Evidence having no relevancy to any issue in the case may, therefore, be properly excluded, and its admission constitutes error. Moreover, it must bear on an issue which is material in the case." (18 Cal. Jur. 2d 553; § 116.) The "search for and discover" evidence had no place in the record and it was prejudicial error to

permit the appellee to introduce it because, by her pleading with respect to the element of conscious pain and suffering and also her claim for damages by reason of the death, she confined and restricted herself to the *sole and specific* claim that the personal injuries were directly caused by an alleged negligent *omission* to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. (*Union Oil Co. of California v. Hunt*, 111 F.2d 269, 277.)

The mere fact that the jury returned a verdict in favor of appellant on the claim set forth in the first 8 paragraphs of the "First Cause of Action", is not necessarily indicative of the conclusion that its verdict against the appellant on the "Second Cause of Action" was uninfluenced by the evidence of the failure on the part of some person aboard the vessel to actually look into the ventilator shaft and discover N. P. Hutchison in an injured but living condition. The record affirmatively shows that at least some of the jurors were so rebellious and their minds so prejudicially impregnated by this immaterial and impertinent subject matter that they were not willing to and did not accept or follow the instruction given to them in respect of this "red herring" before they *commenced their deliberations*. (supra.)

The jurors went to lunch at 12:55 p.m., October 14, 1955 (R.T. p. 825; T.R. p. 550); and to dinner at 5:10 p.m. Their deliberations continued, except for lunch and dinner, from 12:55 p.m. until 10:23 p.m. of the same day. (R.T. pp. 829-830; T.R. p. 551.) At this time the jury returned to the courtroom for further instructions, *inter alia*, "regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this can not apply to the second cause of action" (R.T. p. 830; T.R. p. 82.) Upon this occasion the trial court indulged in a long, indistinct and

obviously erroneous dissertation with reference to the subject of negligence in failing to conduct a search. (R.T. pp. S30-S32; T.R. pp. 551-553.)

In spite of and *subsequent* to this, the foreman of the jury made the following statement, in the presence of all the rest of the jury: "Your Honor, *I feel sure* that *some* jurors *still* feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with the cause of action, the second cause of action. If you wish I can tell you why." (R.T. p. S43; T.R. p. 562.) None of the jurors challenged or disagreed with that statement. All of the jurors, by remaining *silent* agreed with and corroborated the clear statement of the foreman.

The foreman had *actual* knowledge of what had transpired in the jury room and he expressed his unqualified conclusion, based thereon, that in spite of the instruction to consider the matter of negligence in not conducting a search only with reference to the "first cause of action", some of the jurors were still determined to use this evidence in connection with the second cause of action. This recalcitrant attitude of the jurors was not conducive to a fair and impartial finding of fact with respect to the sole claimed negligent omission referred to in paragraph VIII. The jurors who had demonstrated that they were willing to disregard the original instruction continued to be the same type of persons. If they would refuse to follow the instruction the first time it was given they would continue such refusal; but in voting for a verdict in favor of appellee they would not be inclined to announce in the jury room, that they were doing so on the basis of a finding of actionable negligence in not conducting a search. They would just vote and remain silent with respect to the reasons.

If the trial court had submitted a separate form of verdict or special interrogatories which would require a

definite affirmative or negative vote by each juror on this subject, the jury might very well have been constrained to render a verdict in appellant's favor on "the second cause of action."

Appellant was entitled to a good climate in which to try its case. The "failure to search and discover" theory should not have been permitted to enter the jury's minds. The trial court was convinced that he did not dare submit a separate form of verdict or an interrogatory with respect to this subject for the reason, as he expressed it, that appellant could "appeal on the ground that it is not the cause of action that is pleaded in the amended complaint, and I think you would be sustained on it." (R.T. pp. 850-851; T.R. p. 569.) He thereby definitely indicated that while he was willing to permit the appellee and the jury to juggle and play with this extraneous matter, no verdict could properly be based upon it. Therefore, it should have been excluded altogether.

The brief for appellant Emma Hutchison, on the first appeal, case No. 13,852, prepared and signed by Raymond C. Simpson and George E. Wise, is quoted with respect to this subdivision of this brief, as follows:

"The attitude of the Federal Courts toward the interjection of * * * appeals to prejudice or passion has been clearly stated in so many cases as to now require but a brief statement. In substance the Courts have held that remarks made in the presence of the jury which tend to excite their prejudices or passions, or to cause resentment or unjustly enlist their sympathies in favor of one adversary as opposed to another, are always improper and should be avoided."

(Br. for Appellant Emma Hutchison, p. 22, ll. 4-12.)

"Under our system of jurisprudence, *it is the duty of the court and its officers, the counsel of the parties, to prevent the jury from consideration of ex-*

traneous issues, of irrelevant issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission to discharge this duty, or a persistent violation of it, makes the trial unfair.'

(Br. for Appellant Emma Hutchison, p. 27, ll. 14-21.)

They are thus pierced by their own sword.

As this Court said: “* * * the atmosphere in which the trial was had permeated the entire case to the prejudice of the appellant and warrants the conclusion that the appellant did not get a proper trial.” (*Hutchison v. Pac. Atl. S.S. Co.*, 217 F.2d 384, 386.)

It is respectfully submitted that appellant suffered substantial prejudice by reason of each and all of the foregoing matters.

(b) THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ADMITTING AND REFUSING TO STRIKE ORAL AND DOCUMENTARY EVIDENCE NOT RELEVANT OR MATERIAL TO ANY ISSUE OF ACTIONABLE NEGLIGENCE.

The assigned errors involved here are 3, 4, 6, 22, 23 and 32. By reference thereto appellant incorporates herein as part of its affirmative argument in support thereof all of said assignments of error and the objections and motions, including the grounds stated in respect of said objections and motions, as set forth in the specification of errors, *supra*. It also incorporates herein its preceding argument with respect to the immateriality and impertinence of the extraneous matter contained in paragraph IX.

The principle that the tort liability of a corporation is vicarious is elementary. Such entity can not perform any act or omit any matter or thing excepting by and through some officer, agent or employee acting within the course

and scope of his agency or employment. (*Reynolds v. N.Y.O. & W. Ry. Co.*, 42 F.2d 164, 167-168; *Fimple v. Southern Pac. Co.*, 38 C.A. 727, 732, 738-739, 177 P. 871.)

It is axiomatic that no evidence with respect to any claimed negligent act or omission is admissible in the absence of averments in the complaint setting forth such claimed negligence and the existence of the essential proximate causal connection between the same and the resulting damage. (20 Am. Jur. p. 239, § 246; 20 Am. Jur. p. 242, § 248; 20 Am. Jur. p. 245, § 51; 31 C.J.S. pp. 864-866, § 158; 31 C.J.S. p. 868, § 159; *Wilkerson v. City of El Monte*, 17 C.A.2d 615, 624, 62 P.2d 790.)

1. There is no averment in the pleading stating that the appellant or any agent or employee, in or out of the course of his agency or employment, failed, *negligently or otherwise*, to *account for the working hours or places of Hutchison or that such, if any, omission proximately caused or contributed to the personal injury suffered when he struck the bottom of the ventilator shaft; or to his death*. Nevertheless, in clear contravention of the fundamental right of appellant to due process of law in the form of actual notice that such issue was tendered as an element of *claimed* actionable negligence, and in total disregard of the specific and sole issue raised by the pleadings, the trial court permitted appellee to sneak up in the darkness of an *unpleaded* matter and slug the appellant in the back of the head with the *admittedly hearsay* and irrelevant "testimony" of Crawford that a custom in effect on April 1951 required an employer of a seaman "to *account* (e.g. to keep track of by *observation*) for the *working hours and places of each member of the crew at all times*."

"Proof of a custom can not be said to be enough to submit that issue to the jury unless there is substan-

tial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite and uniform circumstances.”

McClellan v. Pennsylvania R. Co., 62 F.2d 61, 63.

Appellant contends that whenever a plaintiff bases a claim of negligence upon the violation of a custom, not claimed to be a custom of the particular defendant involved, *such* custom must be *pleaded*. Crawford did not testify that he had ever been in Baltimore or in any other part of Maryland. If custom, practice or usage could have been relevant in the case at bar there would have to be evidence showing that such custom, practice or usage was in existence at Baltimore, Maryland, on whatever date it was that Hutchison fell or got into the ventilator shaft.

The jury *could* have used this irrelevant and impertinent testimony to concoct a basis of liability on the theory that it was the duty of appellant to have somebody assigned to the specific job of *watching* Hutchison *at all times and in all places*; and that if such duty had been performed Hutchison would have been immediately rescued from the bottom of the shaft, taken to a hospital, operated upon and thus his life *might* have been saved; or, perhaps, that such “watchman” could and should have warned Hutchison or otherwise *prevented* him from falling to the bottom of the shaft. The realm of speculation, surmise and conjecture which can be suggested by the ingenuity of a *sympathetic* jury is practically infinite. The trial court refused to tell the jury that it was not entitled to speculate, surmise or conjecture; and on the contrary left the gate to this field wide open. While the trial court read two paragraphs of the complaint to the jury it did not at any time *state or define* the issues and, in fact, *deliberately refused to do so*. The trial court in its instructions called the attention of the jury to every factual

basis of possible liability within the four corners of the Jones Act and thus invited the jury to make use of them in deciding that appellant was liable. (T.R. p. 775.)

When a plaintiff has averred that an injury or death was proximately caused by a single specific negligent omission evidence as to *other* claimed negligent acts or omissions is inadmissible. (*Wilkerson v. City of El Monte*, 17 C.A.2d 624, 62 P.2d 790.)

Evidence, including appellant's answer to written request for admission 1(c), upon the subjects of the lack of permanent artificial lighting fixtures inside the port compartment of masthouse number 2; and the degree of visibility therein with the door closed; and Crawford's testimony and conclusion with respect to the thorough artificial illumination of all work areas, such as masthouses, was clearly irrelevant and prejudicial in the total absence of other and additional *testimony* showing, or from which it could be reasonably inferred, that at any time when Hutchison *could* have been in the masthouse "in the course of his employment" said door was closed; hatch number 3 was covered and that no natural light was entering through the port ventilator cowl; or that the degree of visibility then actually present was not sufficient to enable him to see and recognize, by the normal use of his faculties of perception, all of the things within the area of the masthouse. (*Smith v. Arcadia Overseas Freighters*, 202 F.2d 141; 20 Am. Jur., p. 245, § 51; 31 C.J.S. p. 874, § 164; 18 Cal. Jur. 2d p. 556, § 117; *Shanahan v. So. Pac. R. Co.*, 188 F.2d 564, 567-568, and *Hoffman v. Palmer*, 129 F.2d 976, 998.)

3. Without requiring the slightest preliminary foundation or subsequent additional evidence that the ventilator shafts he had observed on "other ships" were in areas *substantially similar* in design, construction, in-

tended purpose, and the relative locations of each with respect to the others, in comparison with the *inside* of the port compartment of masthouse No. 2 aboard the "Linfield Victory", the court permitted Amundsen to testify (and refused to strike the same) that "other ships got screens down here" over the openings of the ventilator shaft; that he had not seen on other ships, in mast-houses, a ventilator opening without a ladder going down it; that on other ships having access ladders in a masthouse, the arrangement of the guard rails in mast-house No. 2 were different than those on other ships, in that on other ships the bars go right across the area above the starboard edge of the access shaft containing the ladder; and permitted Crawford to testify (and refused to strike the same) that he had seen "a heavy screen which excludes the danger; which would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity."

Amundsen did not testify that he had ever seen a screen over the top of any ventilator shaft when there were pipe railings barricading what would otherwise be open sides or edges at the head thereof; or that he had ever seen a ventilator opening or shaft of the type installed in the port compartment of masthouse No. 2 with a ladder going down it. It is obvious that some ships might and probably do have a single shaft used as a *combination* ventilator and access shaft to permit ventilation of lower holds and passage to and from lower deck levels. Such combination shaft would obviously have a ladder in it. Crawford did not testify that he had ever seen a heavy screen surrounding a ventilator shaft of the type installed in the port compartment of masthouse No. 2.

There is no evidence in the record showing that all masthouses are designed or constructed in a substantially similar manner.

The court admitted this evidence upon the premise that the jury would be entitled to find therefrom that the appellant negligently failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work, upon the theory that the appellant could have absolutely insured the safety of Hutchison by making it utterly impossible for him to have gotten into the ventilator shaft in any manner whatsoever or at all.

Appellant respectfully submits that it is paradoxical to say, *as a matter of law*, in one breath that the employer of a seaman is not an insurer of his safety and is not required to furnish a place of work which is absolutely safe, and in the next breath to say that a jury is entitled to find *as a matter of fact* that such employer is guilty of negligence upon the sole ground that it did not make such place so absolutely safe that it would be utterly impossible for any seaman, careful or careless, to suffer the slightest injury.

If, as appellant contends, the admission of this testimony was error, it is an absolute certainty that it was prejudicial error. The authorities last cited, *supra*, immediately previous to the argument of this subdivision (3) are likewise applicable here.

Neither of these witnesses stated when, with reference to April 24, 1951, he had seen what he testified he saw on "other ships", or "some other ship".

The trial court relied upon Wigmore on Evidence, 3rd Edition, § 461, in admitting this testimony. He overlooked or forgot subdivision 3 of said § 461, on page 490, which provides that "The conduct of others must have occurred under *circumstances substantially similar*." (e.g. A vessel owned by the United States, bare-boat chartered to the defendant, with a specific prohibition against making *any*

structural changes in the appurtenances without prior written consent of the owner.)

The trial court also erroneously admitted and refused to strike the conclusion and opinion of Crawford to the effect that the ventilator shaft was a dangerous area and that the heavy screen referred to was for the purpose of excluding such dangerous area and that there was an area of *access* immediately close to it.

Appellant respectfully submits that it has sufficiently covered its contentions in respect of the testimony of Castle, Kalnin, John Hutchison, Adelstein and Dickerson in the incorporated matter referred to in the first paragraph of this subdivision of its brief and will therefore present no further argument with respect thereto.

(c) **THE COURT ERRED IN PREJUDICING THE JURY AGAINST APPELLANT AND REFUSING TO GIVE APPELLANT A REASONABLE TIME AND OPPORTUNITY TO STATE DISTINCTLY THE MATTER TO WHICH APPELLANT OBJECTED WITH RESPECT TO THE GIVING AND THE FAILURE TO GIVE INSTRUCTIONS AND THE GROUNDS OF ITS OBJECTIONS.**

The pertinent specification of error involved here is 9.

1. The jury, just before the commencement of the ~~final argument of~~ ^{reception stated by} appellant's attorney, was prejudiced against the appellant by reason of what the trial court, in effect, told the jury would be an unreasonable, unwarranted and useless waste of at least a substantial part of the noontime recess of an hour and a half to which the jury was entitled according to custom. At the outset of the instructions the trial judge stated: "I *am* a lawyer and what I tell you comes from the law books or from my *reasonable* application of the principles in the law books to the law of this case." (R.T. p. 757; T.R. p. 494.) Naturally, the jury accepted this as incontrovertible.

In the morning of the previous day, the trial court stated, out of the presence of the jury, as follows: "It is just not conducive to the proper tranquility that the *jury* should have, for us to spend an hour and a half or two hours in the stating of exceptions". (R.T. p. 600; T.R. pp. 356-357.) " * * * I hope we can keep the exceptions down to where the *jury* doesn't become *irritated* at any of the personnel here, either you or Mr. Simpson, or the Judge *because of the extended duration of the statement of exceptions.*" (R.T. p. 602; T.R. p. 358.)

After the trial court had completed what appellant claims no one should deny was a one-sided, prejudicially erroneous charge, amplifying every possible element favorable to the appellee, expanding the issues far beyond the sole and specific issue with respect to the claimed negligent omission of the appellant, and self-contradictory and conflicting, the trial court announced in the presence of the jury that it was noontime. It was not required, in view of the fact that the instructions had not been completed and the jury could have been excused for the usual lunch-time recess, that the jury be deprived of this expected privilege. Accordingly, appellant's attorney requested the trial court to excuse the jury so that it might go to lunch. Having already announced its belief that an extended statement of exceptions would upset the tranquility of the jury and cause it to be irritated with respect to whoever might be responsible for compelling it to sit around, either in the court room or in the jury room, the trial court in an angry mood announced, in the presence of the jury, as follows: "They won't have to sit long. Except in a *couple of extraordinary* cases I have had, the statement of these matters has *never* taken more than *five or ten minutes*, and *I am not going to let it take more here, and I don't think anyone would offer more here.*" (R.T. pp. 795-796; T.R. p. 527.)

Having already attempted to adversely propagandize appellant's attorney by its dissertation with respect to *tranquility and irritation* of the jury on the previous day, the trial court in the presence and hearing of the jury, attempted, by the foregoing statement, to intimidate or coerce appellant's attorney to the point where he would, rather than incur their displeasure, confine his objections or exceptions to a time not in excess of "five or ten minutes" because no reasonably competent or average attorney would offer objections or exceptions which would require more time.

The jurors are presumed to know the definition of the word "lawyer". According to Webster's New International Dictionary, Second Edition, Unabridged, a "lawyer" is "one versed in the laws" and a "case lawyer" is one "who is specially versed in the details of the decisions of the courts, rather than in the science of the law, and theoretical law." Thus, a lawyer is one versed in the science of the law. The trial court told the jury, in effect, that anyone who took more than five or ten minutes to object or except to the instructions given or refused was not a "lawyer" or even a "case lawyer". The trial court pyramided the prejudicial effect of the foregoing statements by *inaccurately* telling the jury, after proceedings at side-bar which were *visible* to the jury so that they could observe that appellant's attorney was the only one who made *any* statements to the trial judge, that the ensuing procedure would require "several minutes". (R.T. pp. 795-797; T.R. p. 528.) They did not go to lunch until almost 1:00 o'clock. (R.T. p. 825; T.R. p. 550.) Can this Court say that appellant was *not* thereby prejudiced?

2. Rule 51, F.R.C.P., provides, in part, that "No party may assign as error the giving or the failure to give an

instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity *shall* be given to make the objection out of the hearing of the jury.” Rule 46, F.R.C.P., provides, in part, that “If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.”

Appellant contends that any party has an absolute right, not within the control of any discretionary power of a trial court, to take as much time as is necessary to assign as error the giving or the failure to give instructions in order to state distinctly the matter to which he objects and the grounds of his objection. The only possible curb with respect to this absolute right is that there be no repetition of any matter to which the party has distinctly stated his objection and the grounds thereof.

The right to make the particular kind of record which the rules require in order to effectuate the absolute right to take an appeal is not subject to any curtailment by the trial court, and a deprivation thereof is prejudicial, reversible error. This point is immaterial unless this Court takes the position that some of the errors of which appellant hereinafter complains with respect to the giving or the failure to give instructions are not available for the reason that Rule 51, F.R.C.P., has not been complied with in respect of such matters.

Appellant’s attorney, before commencing the statement of its objections and exceptions, took a specific exception to the remarks of the trial court, in the presence of the jury, to the effect that “ordinarily competent lawyers would not (take) exceptions which took more than five or ten minutes” and stated that “It is impossible for me to state the exceptions that I have to *the charge* which

you have *given* in any five or ten minutes. It is physically impossible." Appellant's attorney requested one hour. The court arbitrarily imposed a limit of one-half hour. He then reduced it to 26 minutes. An objection was made to the restriction and it was contended that it was impossible to comply with the rule within this limit. The trial court, exhibiting his anger, then stated: "I don't care about your contentions." (R.T. pp. 796-798; T.R. p. 529.)

When an attempt was made to state distinctly the matter to which appellant objected and the grounds of its objection to the instruction that the fact that the United States has or had an interest in the vessel does not affect the responsibility of the appellant, the trial court peremptorily interrupted with the statement: "I don't care what grounds you state." A request to state it for the benefit of the United States Court of Appeals was abruptly halted with the statement: "They will know what you are getting at." (R.T. p. 799; T.R. p. 530.) Other examples of the same type are the following: The instruction in respect of the physical structure of the ship (R.T. pp. 799-800; T.R. p. 530); The exception to the refusal to submit an interrogatory requesting the jury to state on what date Hutchison suffered his injuries and at what time on such date (R.T. pp. 808-809; T.R. pp. 538-539); The refusal of the court to give Defendant's Proposed Instruction No. 14-A (R.T. p. 811; T.R. p. 640); Refusal to give Defendant's Instruction No. 17 (R.T. p. 812; T.R. pp. 541-542).

Before appellant's attorney had an opportunity to any more than scratch the surface or hit all the high spots he was peremptorily stopped with the unjustified and inapplicable statement of the court: "You are not going to run this courtroom." (R.T. p. 817; T.R. p. 546.) There is

nothing in the record to indicate that appellant's attorney was trying to do anything except his duty.

Appellant's attorney intended, in the event the trial court would permit him to do so, to go through each of the refused instructions and point out distinctly to the trial court all of the essential matters therein contained which had not been covered by the instructions given; and also to point out how other (and up to that point unmentioned) erroneous statements and assumptions in the instructions as given were prejudicial and in direct conflict with the law applicable to the issues and evidence in the case.

During this unusual proceeding, the trial court made the statement that appellant's attorney came into court with the announced intention to appeal if he lost, and to trick the court into error; and that the judge couldn't try this case without error that he could get it reversed on. (R.T. p. 809; T.R. pp. 538-539.) *Nothing* in the record supports this statement. In its request for the preparation of the record in the court below, appellant specifically requested that this be included if it existed.

The trial court exhibited the deep animosity he harbored against appellant's attorney by indulging in the statement of an unjustified and insulting personality: "*Your face has been twitching, you have been blinking like Susie on television. You have been an absolutely intemperate advocate here.*" (R.T. p. 980; T.R. p. 539.)

Judge Tolin forgot that only the day before, on October 13, 1955, he had stated, in response to a direct question whether he had any criticism of the conduct of appellant's attorney in the presence of the jury, at least up to that time, as follows: "*Actually I don't know. I haven't felt moved to make any. I think you have gotten overly zealous in your case. I wouldn't say that there is*

any reason to say that you had misconducted yourself.” (R.T. p. 597; T.R. p. 354.)

Appellant contends that no attorney could, within the time limit imposed upon its attorney by the trial court, state distinctly or otherwise the clearly available objections to the instructions as given by the court or in respect of the refusal to give the requested instructions.

In support of a contention, if it is necessary, that appellant should not be restricted, on this appeal, to the specific objections which were actually made to the giving and the refusal to give instructions, it cites the following authorities

Williams v. Fowler, 135 F.2d 153;

Wright v. Farm Journal, 158 F.2d 976;

Lumbermen's Mut. Cas. Co. v. Hutchins, 188 F.2d 214;

Harlem Taxicab Ass'n. v. Nemish, 191 F.2d 459;

and

Delaware & Hudson Co. v. Ketz, 233 F.2d 31.

(d) **THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT WITH RESPECT TO THE CLAIM OR COUNT DESIGNATED AS THE "SECOND CAUSE OF ACTION" AND IN DENYING ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.**

The assigned errors involved here are: 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

The facts to be discussed are set forth with appropriate references to the record in the "Statement of the Case." In addition, appellant by reference thereto incorporates herein, as part of its affirmative argument, all of the grounds and argument in support of its motions for directed verdict and for judgment notwithstanding the verdict, as follows:

1. Motion for directed verdict at the close of plaintiff's evidence. (R.T. pp. 392-402; T.R. pp. 291-302.)

2. Motion for directed verdict at the close of all of the evidence. (R.T. pp. 578-580; T.R. pp. 338-340.)

3. Motion for judgment notwithstanding the verdict. (T.R. pp. 86-89.)

Appellant by reference thereto incorporates herein and makes a part hereof the oral argument of its attorney, to the jury, from and including page 642, R.T., T.R. p. 389, to and including R.T. 719, T.R. p. 460.

One of the basic propositions involved in a case premised upon the Jones Act, as implemented by the F.E.L.A., is the following: If a seaman, *while exercising ordinary care for his own safety*, suffers personal injury in the course of his employment, the employer is liable for the *total* amount of the damage proximately resulting therefrom if such injury has resulted in whole or in part by reason of negligence on the part of the employer. If the law were otherwise it would never be possible for an injured seaman, in any case, to recover the *total* amount of the damage sustained. No employer of a seaman is required to *anticipate or provide against negligent, improper or unusual conduct* on the part of the employee in his use of the place of work or the appliances appurtenant thereto. Therefore, if a place of work is reasonably safe *when used with ordinary care by the employee* there is no basis of liability on the part of the employer. (*Renaldi v. N.Y., N.Y. & H.R. Co.*, 230 F.2d 841, 844.)

The foregoing propositions are fully supported by the following authorities: 56 C.J.S. pp. 1005-1006, § 51; *Vileski v. Pacific-Atlantic S.S. Co.*, 163 F.2d 553; *Meintsma v. United States*, 164 F.2d 976; *Heder v. United States*, 167 F.2d 899; *Gibson v. International Freighting Corp.*, 173 F.2d 591; *Shields v. United States*, 175 F.2d 743; *Larsson v. Coastwise Line*, 1950 A.M.C. 176, 181 F.2d 6; and *Atlantic Coast Line Ry. Co. v. Dixon*, 189 F.2d 525.

"The judge had charged that the plaintiff must make reasonable use of his own faculties to observe

and avoid danger, and that he must be presumed to know what the ordinary use of his faculties would make apparent to him. *This was equivalent to saying that he might not be careless of his own safety, if the defendant was to be liable.*”

Nagle v. Isbrandtsen Co., 177 F.2d 163, 164.

It is a matter of common knowledge, particularly within the scope of judicial notice by a court experienced in cases of admiralty and maritime jurisdiction, that pipe railings, exactly the same in design, construction and purpose as those surrounding what would otherwise have been two open sides at the head of the ventilator shaft in masthouse No. 2 aboard the “Linfield Victory” have been in use, and furnishing at least reasonable safety, for many years along the edges of catwalks located high above the floor or deck of engine rooms; along the athwartship edges of boat decks, bridge decks and flying bridge decks located high above the level of the main deck; along the port and starboard edges of decks high above the water through which a ship may be navigated and that around the edges of uncovered hatches in decks below the main deck of ocean-going vessels there is never anything provided in the way of barricades excepting a temporary rope or chain strung through holes or links attached to stanchions located at the four corners of such hatches. Such appliances have always been considered as all that is reasonably required to warn a *normal* seaman of the presence of the possible danger of falling from such catwalks or decks or into open hatches or to prevent such seaman from inadvertently falling to the surface below. (*Desrochers v. U.S.*, 105 F.2d 919, 920.) It is, therefore, respectfully submitted that this Court should hold, as a matter of law, that the pipe railings surrounding the two sides of the ventilator shaft which would *otherwise* have been open were standard equipment and

all that was required, in the exercise of reasonable care, to make the place reasonably safe. As this Court said, with reference to similar pipe railings located in the engine room of a ship,

“On each side of the boilers were installed the *customary* hand rails about three feet above the flooring. They were of smooth piping about half an inch in diameter. They served the normal ship’s function of affording the fire room crew an appliance upon which they could take hold when the vessel is working in a sea.” (*Vileski v. Pacific-Atlantic S.S. Co.*, 163 F.2d 553, 554.)

It is obvious that no seaman *could* slip through, crawl or roll under or climb over a two-course pipe railing along the sides of a high catwalk in an engine room and fall to the deck below and injure himself if instead of the customary pipe railings a six foot solid steel fence or a six foot heavy wire screen is installed along the edges of such catwalk. The same is true with reference to the catwalks running fore and aft high above the main decks of all ocean-going tankers; athwartship edges of decks high above the main deck; and the fore and aft edges of decks high above the level of the ocean. It is also obvious that it would have been impossible for Hutchison to have gotten into the ventilator shaft, regardless of whether he was drunk or sober, of sound or unsound mind, ordinarily careful or grossly careless or even if he wanted to commit suicide, in the event the head of the shaft had been covered with a steel plate, a heavy screen, heavy gratings or planks of wood or if the starboard and aft sides of said shaft at the head thereof had been physically inaccessible under any possible circumstances by the presence of heavy vertical screens or steel plates.

In the argument of appellee’s attorney to the jury and in her memorandum in opposition to appellant’s motion

for judgment notwithstanding the verdict, the same theory was advanced and appealed both to the jury and to the trial judge. As stated in the written memorandum it is, as follows: "If using reasonable care to make the place reasonably safe means making it at the same time *absolutely* safe, whether by use of screens or other devices, the defendant is still required to do what is necessary to provide a reasonably safe place. An employer is not excused from acting reasonably to make a place of work reasonably safe just because such an act entails doing something which coincidentally makes the place *absolutely* safe." (Page 11.)

Appellant locks horns with the appellee on this fallacious proposition. It has been authoritatively established by much precedent that, *as a matter of law*, the employer of a seaman is not an insurer or guarantor of his safety and is under no obligation whatever to provide an appliance or a place of work which is absolutely safe so that it is *impossible* for the seaman to be injured. The phrases "reasonably safe" and "absolutely safe" are not synonymous. The legal duty imposed upon the employer of a seaman does not, under any circumstances, reach the point where it is required to exercise reasonable care to make the place of work absolutely safe. If the law were otherwise, every employer of seamen would be required to exercise a sufficient amount of foresight and care to absolutely insure or guarantee the safety of each seaman in order to avoid the contingency that the whim or caprice of some jury might cause it to make such a finding.

The legal *duty* of the employer stops *below* the extremely high status of absolute safety and *no jury is permitted to find otherwise*. The established *standards* of care and safety are, respectively, "reasonable care" and "reasonable safety". No more can be squeezed out

of the cases where these propositions have been submitted for *decision* as *disputed* questions of law.

Appellant is aware of the language used, in many cases, that an employer is required to "exercise reasonable care to provide a *safe* place to work." These general observations are *not* precedent supporting a contention that the legal standard is *absolute* or unqualified safety. This specific point was not involved in *any* of these many cases as a *disputed* question of law. The point lurked in the background but was not distinctly involved or ruled upon. (*Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136, 73 L.Ed. 220, 223.)

The jury probably "found" that the appellant had not acted with reasonable care to make masthouse No. 2 reasonably safe for the sole reason that it had not anticipated a *remote possibility* and had not used the extreme precaution of making the ventilator shaft in said masthouse *absolutely unenterable*. Assume that the trial court had instructed the jury as follows: "You are instructed that the ship owner is not an insurer or guarantor of the safety of any seaman and that no duty is imposed upon such employer to make the place of work or the appliances appurtenant thereto absolutely safe; but, on the other hand, if you find that reasonable care on the part of the ship owner required it to provide a place of work and appliances which were absolutely safe, to the end that it would be utterly impossible for a seaman to be injured, then you will be justified in finding that the ship owner was guilty of negligence if it did not make such place of work or the appliances appurtenant thereto absolutely safe." *Would this Court approve such an instruction if it had been given to the jury in the case at bar?* If the answer is in the negative the judgment must be reversed.

The *standards* of care and safety imposed upon the employer of a seaman are *questions of law*, not of fact. These standards, *as a matter of law*, are "ordinary care" and "reasonable safety." (*Seaboard A.L.R. Co. v. Horton*, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062; *Baltimore & Ohio S.W. R. Co. v. Carroll*, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566; *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, cert. den. 342 U.S. 830, 98 L.Ed. 628; *Vojkovich v. Ursich*, 49 C.A.2d 268, 121 P.2d 803.) Therefore, no jury can be permitted to "find" in a case premised upon the Jones Act, that "reasonable safety" requires "absolute safety." If it were otherwise any jury could change the established legal standard of *reasonable* safety to a standard of *absolute* safety; and thus impose the requirement, as a question of *fact*, that the employer *insure* the safety of the employee.

If the verdict of the jury in this case is upheld on the theory that it was lawfully entitled to find, as a question of fact, that *reasonable care and foresight* required the appellant to physically block all possibility that Hutchison *could* fall to the bottom of the ventilator shaft, then the masthouse of every one of the several hundred Victory ships will have to be revised or rebuilt to avoid the application, as precedent, of the judgment of this Court. Such holding would also apply to catwalks, all deck edges and lower deck hatches on all ships of the American Merchant Marine and cargo vessels owned or operated by the United States. Does the Court feel justified in taking this leap beyond the orbit of established precedent?

It is a *presumption of law*, which the jury and the trial court were *bound* to accept ("rubber stamp": if one chooses to colloquially express it) in the absence of direct or indirect evidence controverting it, that the masthouse and its appurtenances were *standard and customary*

equipment. Amundsen's testimony as to screens and additional bars across the starboard side of the access shaft and a ladder in the ventilator shaft "on other ships"* and Crawford's testimony that he had seen heavy vertical screens surrounding a ventilator shaft on *some* ship, does not prove or tend to prove that the "Linfield Victory" masthouse No. 2 was not in strict accordance with standard, adequate, accepted and customary design and construction.

It was the legal duty of the United States of America, the owner of the "Linfield Victory" pursuant to the bare-boat charter, appellant's Exhibit "B", to deliver the vessel to appellant, "so far as due diligence can make her so, * * * *well and sufficiently* tackled, apparelled, furnished and *equipped*, and *in every respect seaworthy* * * * and *in all respects fit for service.*" (Part II, Clause 1, Appellant's Exh. "B".)

It is a presumption of law, binding upon the court and the jury, in the absence of direct or indirect controverting evidence, that the responsible agents of the government charged with the legal duty of performing the obligations of the government fully discharged their official duty and exercised at least ordinary care with reference thereto. The Congress has recognized and provided by statute that the "American Bureau of Shipping" is a governmental agency. (41 Stat. 998, 49 Stat. 1987, 2016, 46 U.S.C. 881.) It is therefore a presumption of law, disputable but binding unless controverted, that the vessel at the time of delivery was in "Class A-1" as prescribed by the "American Bureau of Shipping". Pur-

*Hutchison fell head first down the *ventilator* shaft. Therefore the absence of a ladder therein or bars across the access shaft could not be a proximate cause of the injury or death. He did not injure his hands or arms. Therefore he must have been inert. Otherwise he would have stretched his arms out to break the effect of the fall.

suant to the aforementioned contractual obligations of the government it was the official duty of the Coast Guard marine inspectors to exercise ordinary care in determining that the vessel was so far as due diligence can make her so, well and sufficiently tackled, appareled, furnished and equipped, in every respect seaworthy, and in all respects fit for service. The bare-boat charter also provided that the appellant was prohibited from making any structural changes in the vessel or any changes in the appurtenances thereof without in each instance first securing the written approval of the government. (Part II, Clause 11.) The vessel was not “*controlled*” by appellant; and the averment that appellant controlled it is unproved. (Para. IV, complaint.)

In the absence of actual or constructive notice to the contrary, the appellant was entitled to rely and act upon the assumption that the government and its duly constituted officials had fully performed all their obligations and duties.

Before issuing the marine inspection certificate referred to in Part II, Clause 1, appellant’s Exhibit “B”, it was the statutory and official duty of the United States Coast Guard to carefully inspect the vessel throughout and satisfy itself that such vessel was of a structure suitable for the service in which she was to be employed and “in a condition to warrant the belief that she may be used in navigation as a steamer, *with safety to life*”. (60 Stat. 1097, 46 U.S.C., § 391.) It was also the statutory and official duty of the United States Coast Guard not to issue a certificate of inspection with respect to the “*Linfield Victory*” until it had approved the vessel and her equipment *throughout*. (60 Stat. 1352, 46 U.S.C., § 399.) In the absence of evidence, direct or indirect, to the contrary, the law presumes that the United States Coast Guard officials performed their official duty and that in

doing so they exercised at least ordinary care. Various Coast Guard inspectors participated in the annual inspections of the considerable number of Victory ships which had been bare-boat chartered by the government to appellant, owned by the appellant, and those which appellant was operating for the government under a general agency contract. The act of issuing a regular certificate of inspection for each such vessel constitutes an official and impartial opinion that each of said vessels fully complied with all of the requirements of the law, particularly in respect of safety to life. This official opinion is substantial *evidence*. The certificates of inspection are required by statute to "be verified by the oath of the Coast Guard official signing it". (46 U.S.C., § 399.) Therefore each such certificate is an *affidavit*. It is the *equivalent of personal appearance testimony under oath*.

Keeping in mind the contractual obligations and duty of the United States of America, the *owner* of the "Linfield Victory", as provided by Part II, Clause 1, Exhibit "B" and the duties imposed by the provisions of §§ 391 and 399, Title 46, U.S.C., upon the United States Coast Guard inspector who verified appellant's Exhibit "B", said certificate is *evidence under oath* that insofar as due diligence could make her so, the "Linfield Victory" was well and sufficiently tackled, appareled, furnished and equipped, in every respect seaworthy and in all respects fit for service in the operation of the appellant's inter-coastal service. (Part I, Clause B; Part II, Clause 1, Bare-Boat Charter Agreement, Exhibit "B".)

The fact that the United States of America as the owner of the vessel retained full and complete control of the same with respect to structural changes or changes in the appurtenances when considered in connection with the proposition that the appellant was entitled to assume that

as far as due diligence could make her so the vessel was well and sufficiently tackled, appareled, furnished and equipped and in every respect seaworthy and in all respects fit for service, is of the utmost importance in determining whether any jury would be entitled to find, on the basis of the material, relevant and competent evidence in the record of the case at bar, that the appellant negligently failed to anticipate that an incident such as the precipitation of Hutchison to the bottom of the ventilator shaft in the port compartment of masthouse No. 2 was a reasonable possibility; against which the appellant was required to take some affirmative step in order to prevent the same. Appellant contends that there is absolutely no basis in the record upon which the jury could, as distinguished from whether it should, have made such finding.

There is no direct evidence showing or from which it can be reasonably inferred that Hutchison was precipitated or fell into the ventilator shaft on April 24, 1951. Appellee averred in the complaint that the exact date of the fall was April 24, 1951. There is no evidence to the effect that his body was dressed in the same clothing he had worn during the morning of that date. The ship was moored to a dock. It was the burden of appellee to show by *evidence* that the relationship of employer and employee was in full force and effect at the precise time of the fall and that Hutchison was also acting in the course of his employment. She was required to introduce affirmative evidence from which the jury could reasonably infer *when, how and why* Hutchison got into the ventilator shaft. She completely failed to do so.

The trial court *knew* that the jury could not say *when* the fall occurred and refused, for *that* reason, to submit an interrogatory requiring a definite answer as to the

date and time. (R.T. p. 808; T.R. p. 538.) The single fact that Hutchison's dead body was found in the bottom of the shaft on April 30, 1951 plus the testimony of Amundsen and Kalnin does not furnish a premise upon which to deduce reasonable inferences on the vital elements of when, how and why he happened to get there. The evidence introduced by appellee left these matters solvable, if at all, only by resort to *guesswork, surmise and conjecture*. That is not enough. There is no evidence showing that the degree of light was inadequate under *the conditions existing on April 24, 1951*.

Affirmative evidence offered by appellee supplies what amounts to conclusive proof that masthouse No. 2 and its appliances were and each thereof was at least reasonably safe. Kalnin testified that masthouse No. 2 and the access shaft containing the ladder were used constantly by seamen and longshoremen during the more than four months that he was a member of the crew. He had also been a crew member on several other Victory Ships.

With reference to the specific date upon which the appellee *claims* that Hutchison was in some manner precipitated to the bottom of the ventilator shaft, the testimony of Kalnin and Amundsen shows without conflict that Hutchison, Amundsen and other fellow crew members, without the slightest compulsion used the masthouse deck area, the appliances therein and the access shaft with the ladder without any difficulty, incident or accident. Amundsen *opened the masthouse door at 8:00 a.m.* It is a presumption that it remained open in the absence of *direct* evidence that it was thereafter closed. Amundsen and others went down at 8:00 o'clock, up at about 10:15 o'clock, down at about 10:30; up somewhere around 11:30 for lunch, down at 1:00 o'clock and up again at 3:00 p.m. when work was completed. Hutchison had used the ladder on at

least two occasions, once when he came up for coffee with the rest of the crew and next when he went down after coffee. If Amundsen's testimony is accepted at face value, Hutchison also used the ladder, without incident, at least a third time. Amundsen testified that he saw Hutchison go out the door at the lower deck level into the access shaft and "walk up the ladder". Amundsen did not say that he saw Hutchison *start* up the ladder. If Amundsen could see Hutchison enter the access shaft and walk up the ladder, it is a *reasonable certainty* that the *degree of visibility* at that point was *adequate*. He could not have seen Hutchison "walk up the ladder" without the presence of light, natural or artificial.

The sum and substance of the whole matter is that the seamen who were using the masthouse and the ladder on April 24, 1951, saw absolutely nothing connected with the masthouse, the appliances thereof, the access shaft, the ladder therein, or the degree of visibility, which indicated to any one of them that there was anything connected therewith which was in any sense not at least reasonably safe. None of these men, with actual knowledge of all of the existing conditions and circumstances, including the element of visibility or light, concluded that there was a possibility that Hutchison might have fallen into the ventilator shaft. They could see no reason why he might have done so. These practical on-the-spot reactions are of conclusive importance. The fact that all of them were able to and did use the ladder without incident or accident, in the manner in which and pursuing the purpose for which the masthouse and the ladder were supplied and furnished, demonstrates that the entire combination, under the conditions which existed on April 24, 1951, was at least reasonably safe.

Hutchison had *actual* notice of all of the existing physical facts, including the degree of visibility. This

appears as a matter of law. He had voluntarily used the facilities *at least* twice before he was injured. He, therefore, demonstrated *his* conclusion that there was no lack of reasonable safety in connection therewith.

Late in May, 1951, plaintiff's witness Castle boarded the ship and without artificial illumination of any kind or character went up and down the ladder several times. If he had had the slightest difficulty in doing this he would have said so. Also late in May, John Hutchison—not a seaman—went aboard the ship and was “in *all* parts of the particular section of the masthouse”. This would include the access shaft and the ladder located therein. George E. Wise, not a seaman, boarded the vessel on May 10, 1952. He got from the masthouse deck level onto the ladder, partially descended it and thereafter climbed up and got back onto the masthouse deck level. If he, with a direct interest in the result of the trial, had had the *slightest* difficulty in doing this he would have said so.

The foregoing evidence, offered by appellee and by which she is bound, demonstrates that when used with even a *modicum* of care, the inside of the port compartment of masthouse No. 2 and everything leading therefrom to the lower deck levels by means of the ladder in the access shaft were and each thereof was reasonably safe and reasonably sufficient and provided, as a matter of law, a reasonably safe means of ingress and egress to and from the place of work. This is all that the law requires and no jury can be permitted to say otherwise.

Appellee claimed in the opening argument to the jury that Hutchison was precipitated into the ventilator shaft at approximately 11:00 a.m. on April 24, 1951. *When* the fallacy of this contention was pointed out in appellant's argument to the jury, appellee's attorney, in his closing argument, equivocated on this subject and stated appellee

was not contending that the accident happened at any particular time. Amundsen's testimony that he saw Hutchison "walk up the ladder" at sometime around 11:00 a. m. and that Hutchison did not come back into hold No. 2 thereafter, does not prove or tend to prove that Hutchison fell into the ventilator shaft at that time. If Amundsen actually saw Hutchison "walk up the ladder" he observed him walk all the way up the ladder. Kalnin's testimony is positive on the proposition that Hutchison came up from hold No. 3 at about ten minutes to twelve and that Hutchison used the access shaft ladder for his ascent on this occasion; and that he thereafter saw Hutchison either in or just leaving the mess-room. He could not have been referring to *coffee* time because he mentioned a "*bowl of soup*". Kalnin's testimony is positive on the proposition that he was standing at the winches at the aft end of hatch No. 3 all during the time from 1:00 p.m. when the men resumed their work to and including 3:00 p.m. when all the work was finished and that Hutchison was not on deck at any time within that period. Therefore Hutchison could not have attempted to descend the ladder at any time between 1:00 p.m. and 3:00 p.m.

How, when and why Hutchison was precipitated to the bottom of the ventilator shaft is, so far as the evidence is concerned, a complete mystery. This mystery cannot be solved by a resort to speculation, surmise or conjecture. (*Union Oil Co. of Calif. v. Hunt*, 111 F.2d 269, 277-278.)

In the trial court, the appellee relied upon the utterly *isolated* statement of the Supreme Court in the case of *Lavender v. Kurn*, as follows:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-

minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.” (*Lavender v. Kurn*, 227 U.S. 645, 653, 90 L.Ed. 916, 923.)

Never at any time before or at any time since has the Supreme Court intimated that speculation (*intuition*) or conjecture may be used by a jury as the basis of a finding that a defendant is guilty of actionable negligence. It is obvious that where “there is an evidentiary basis for the jury’s verdict, the jury is free to (*reasonably; not arbitrarily*) discard or disbelieve whatever facts are inconsistent with its conclusion”. The deduction of the most reasonable inference from disputed facts or conflicts in the evidence is not “speculation and conjecture”. Perhaps Mr. Justice Murphy was a student of semantics. (cf. Webster’s New International Dictionary, Second Edition, Unabridged, page 2417.) He probably used the word “speculation” in the sense of definition number 3, as follows:

“The faculty, act, process, or product of intellectual examination or search; a conclusion, opinion, or decision reached as a result of thought and reasoning; esp., reasoning taking the form of prolonged and systematic analysis; * * * .”

He obviously did not use the word within the meaning of definition number 4, as follows: “Loosely, *conjecture; guesswork*; surmise; as, his statement was mere *speculation*.” One of the definitions of the noun “conjecture”, in the same dictionary, at page 564, is as follows: “Conclusion from appearances or indications; a ground for such conclusion.” It is not conceivable that he used the word as authorizing a jury “to form an opinion or judgment upon what is recognized as insufficient evidence”

or "to arrive at by conjecture or to make conjectures as to; infer conjecturally, or by way of surmise; to form opinions concerning, on grounds confessedly insufficient to certain conclusions.—*v.i.* to make or form conjectures; esp., to draw conjectural inferences; to indulge in surmise."

Appellant contends that the true rule established by many decisions of the Supreme Court before and after the decision in *Lavender v. Kurn*, supra, is that no jury may predicate a verdict or a finding of fact upon speculation, surmise or conjecture.

Appellee's material, competent and relevant evidence is insufficient, as a matter of law, to support findings of fact in her favor with respect to the essential and genuine issues of material fact raised by the pleadings. Having failed to establish the negligent breach of any duty owed by the appellant to Hutchison or the essential element of proximate causal connection by substantial evidence, the case was insufficient to be submitted to the jury.

There is also an insufficiency of substantial evidence on the vital subject of damage. (*Union Oil Co. v. Hunt*, 111 F.2d 269, 277-278.) The evidence is insufficient, as a matter of law, to support the finding of the jury that appellee suffered pecuniary loss in the total sum of \$50,000.00 as a proximate result of the death of her husband. The actual pecuniary damage, if any, suffered by appellee was necessarily future or prospective damage. It is elementary that future damage must be proved by a preponderance of substantial evidence to a reasonable certainty.

The right of action, if any, of the personal representative of the deceased, for the benefit of his surviving widow, arose immediately upon his death and the ap-

pellant then became responsible, *if at all*, in damages for the probable pecuniary loss suffered by the widow as the proximate result of the death.

“But this pecuniary loss was to be determined by conditions existing *at the time of the death* of the deceased * * *”.

Simoneau v. Pacific Elec. Ry. Co., 166 Cal. 264, 275-276, 136 Pac. 544.

It must be kept in mind that insofar as the question of inflation is concerned, that condition was in existence during the entire year 1950 and up to and including the date of Hutchison's death on April 24, 1951. The number of dollars which he earned were depreciated dollars, by reason of the economic situation existing in the United States during that period of time. The present worth or value of the future deprivation of support to the dependent wife of a seaman can not be predicated upon speculation, surmise or conjecture in respect of a mere possibility that there might be a future and additional depreciation in the value of United States money. The dollar *might* return to normalcy. This is likewise speculative and therefore unimportant. The only basis upon which to premise a *reasonable* sum as representing the present value of an actual loss of probable support includes the *certainty* of the continuation of *federal and state* income taxes. These elements must be considered in determining the “take-home” earnings. (*The City of Avalon*, 156 F.2d 500, 501.) No proof of the extent to which the state income tax for 1950 further diminished the gross earnings is in the record but it is an easy matter to calculate from the information in the federal return.

“Although it thus appears that the damages sustained are largely of a prospective nature, the pe-

cuniary loss is to be determined by conditions existing at the time of the death, taking into consideration in measuring it the prospective benefits of which the (beneficiary was) deprived. * * * The jury in considering the probable future benefits which would have accrued must make its finding as to the present value of such benefits and not their future value."

8 *Cal. Jur.* pp. 1005-1006, § 52.

"Damages which are uncertain, contingent, or speculative in their nature can not be made the basis of a recovery. This rule is applicable in actions of contract, and subject to some differentiation as to the degree of certainty required, in actions of tort. It is distinct from the rule, discussed supra §§ 18-22, requiring the consequences to be the natural and proximate result of the wrong. From it results the rule, see *infra* § 28, that a plaintiff to support a recovery must not only show that he has sustained damage but must also show its extent with reasonable certainty.

* * *

"*Future consequences.* Compensation can not be based on a mere conjectural probability of future loss. So an award for future disability can not be based on mere conjectures and probabilities. Where a plaintiff claims compensation for future consequences of an injury ordinarily he must prove with reasonable certainty that such consequences will happen."

25 C.J.S., pp. 489-491, § 26.

The Supreme Court has established the precedent that the amount of damage which may be recovered by a widow pursuant to the provisions of the Federal Employers' Liability Act is confined to "compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings." (*Michigan Central R. Co. v. Freeland*, 33 S.Ct. 192, 227

U.S. 59, 57 L.Ed. 417.) The jury is confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

In *Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 57 L.Ed. 785, the court held that the measure of damage was the pecuniary loss sustained by *dependent* surviving beneficiaries; and that the damage "is limited strictly to the financial loss thus sustained."

The only evidence in respect of the *extent* of pecuniary loss consists of the following: Kalnin testified that Hutchison would "make average wages about 270 something a month plus anywhere from \$80 to \$100 a month overtime, which was an average." (R.T. p. 169; T.R. p. 197.)

"He (Hutchison) shipped in New York as a.b., maintenance." (R.T. p. 115; T.R. p. 166.) (It will be agreed by the appellee that the date of Hutchison's employment in New York was April 17, 1951.)

Mrs. Hutchison's testimony is as follows: I and Mr. Hutchison filed a joint (income tax) return, respecting income for 1950. (R.T. p. 304; T.R. p. 261.) Whenever Mr. Hutchison came off of a trip he would "give me *around* seventy-five percent or *thereabouts* of his money. And he kept the rest, and *we* decided where *to put it* and *what to do with it*. * * * *We* disposed of it, however we did, *in the bank* or whatever *we* wanted to do with it. You know *like any other family* does." That was his consistent practice. (R.T. pp. 305-306; T.R. pp. 262-263.)

This money was community personal property and the husband retained absolute control over it. (Calif. Civil Code, §§ 164, 172.)

The joint income tax return for 1950 is appellee's Exhibit 17. This shows the total gross wages earned by Hutchison for the entire year as the sum of \$4,705.96. The amount of income tax withheld at the source from Hutchison's gross earnings was the sum of \$581.65. There-

fore, the net (take-home) earnings of Hutchison for the entire year 1950 was the sum of \$4,124.31. Seventy-five percent \times 4124.31 \times 19 (the full life expectancy of Mrs. Hutchison) equals the total sum of \$58,600.18. The "present value" of an annual annuity of \$3,084.22 is considerably less than \$50,000.00, the amount which the jury found was the total damage. *The record is absolutely silent on the vital subject of what proportion of the seventy-five percent was actually used or necessary for Mrs. Hutchison's support and maintenance.* Therefore, the amount of the verdict was based upon mere speculation, surmise and conjecture.

There is no evidence in the record showing that Hutchison earned any wages during 1951 excepting as a result of his employment aboard the steamship "Linfield Victory". This employment did not exceed one week in April, 1951.

The decision of the Supreme Court of the United States in the case of *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 60 L.Ed. 1117, demonstrates that the evidence in the case at bar is totally insufficient to sustain the finding of the jury that the total pecuniary loss *could* be the total sum of \$50,000.00.

The jury specifically found that Hutchison was guilty of negligence which proximately contributed to his death. (R.T. p. 857; T.R. p. 574.) It also found that such negligence on the part of Hutchison proximately contributed *only to the extent of ten percent* of the total proximate cause of his death. (R.T. p. 857; T.R. p. 574.) The jury was required to use as a premise the inferred fact that he was in the full possession of his normal faculties; and, under the instructions given by the court, make a definite implied finding that Hutchison was guilty of some negligent act or omission which, in natural and continuous sequence, unbroken by any efficient intervening cause was

at least a substantial factor in producing the injuries resulting in his death and without which the death would not have occurred.

It is an absolute certainty, under the evidence in the record, that Hutchison was the *only* person who *could* have been guilty of any *affirmative* or *active* negligence proximately causing or proximately contributing to the personal injuries resulting in his death. There is no evidence of any slippery condition. The physical equipment and appliances in and about the ventilator shaft in masthouse No. 2 could not have pushed, thrown or caused Hutchison to slip into said ventilator shaft.

The absence of evidence showing that it was not reasonably possible for Hutchison to have observed all of these physical facts consisting of the inanimate objects such as the deck inside the port compartment of masthouse No. 2, the pipe railings surrounding the head of the ventilator shaft, and the access shaft containing the ladder, leads to the *inevitable* conclusion that his own affirmative negligent method of using these physical objects was the sole proximate cause of his injury and death. He had a free choice of routes, either one of which he could have used for the purpose of ascent or descent. The ladder at the aft end of hatch No. 3 was available all during the working hours, except during the *specific* times when a sling was either being raised from or lowered into the hold by means of the winch. It is obvious in view of the evidence that the men were sweeping and cleaning the holds, that there would not be constant ascent or descent of the full or empty dirt slings. There would necessarily be considerable intervals of time between each raising or lowering of a dirt sling during which any one of the men, including Hutchison, if he desired to do so, could have ascended to the deck from the hold or descended from the deck into the hold by means of the aft hatch

coaming ladder. If, *as appellee wants everybody concerned with this case to do*, we indulge in speculation, conjecture and surmise to the extent of “inferring” that the masthouse door was tightly closed, no light was coming in through the hollow ventilator tube, or from the lower hold into the access shaft; that Hutchison, fully cognizant of the fact that he was voluntarily and unnecessarily ascending into an area which was so dark that he could not see his hand in front of his face, nevertheless *continued to ignore the hazard* of such foolhardy conduct, it follows that we must also arrive at the *inevitable* conclusion that such negligent and reckless conduct on his part was the sole proximate cause of his injury and death. (*Bohannon v. U.S.*, 1950 A.M.C. 1008, 92 F.Supp. 700, 185 F.2d 678.)

If, which appellant seriously and strenuously disputes, there is *any* basis for the application of the doctrine of comparative negligence here, it seems obvious that the percentages should have been reversed by the jury. The finding of the jury that negligence on the part of Hutchison proximately contributed to his death *only to the extent of ten percent* of the total proximate cause is ridiculous. It is directly contrary to, and unsupported by, the evidence. (Of course, the clearly erroneous and “one sided” instructions and “comments” of the trial court had considerable influence in leading the jury astray.)

The evidence shows without conflict that Hutchison was 66 inches in height. The masthouse doorway was 54 inches high. If, instead of properly stepping over the coaming in an effort to enter the masthouse from the outside, Hutchison negligently stepped upon the upper edge of said coaming and remained erect he could very easily have caused a violent contact between some part of the top of his head and the upper part of the doorway. If this occurred he could have been stunned, lost his balance and sense of

equilibrium, come in violent contact with the upper pipe railing and have been catapulted to the bottom of the shaft. Self-preservation is one of the strongest instincts; and the natural reaction of a man, in the full possession of his faculties, in falling head-first, would be to stretch his hands out ahead of him to break the force of the fall. The only injuries referred to by Dr. Glauser in his deposition were confined to the head. He mentioned no injury whatever to the hands or arms; not even a bruise. It is, therefore, reasonable to infer that Hutchison was not in the full possession of normal faculties between the start of the fall and the time he landed on his head at the bottom of the ventilator shaft. Did he suffer a dizzy spell or "black-out" as a result of physical exhaustion stemming from his night out and the effort of an overweight man in climbing up the ladder from the lower hold?

Appellee's exhibit 15 (Log Entries), under date of April 30, 1951, shows that from 1700 until 1900 (5:00 p.m. to 7:00 p.m.) W. R. Sayer, Lt. Comdr., United States Coast Guard, Merchant Marine Investigating Unit, was aboard the vessel investigating the death of Hutchison. This activity was conducted pursuant to the statute which provides

"for the investigation of marine casualties involving *loss of life* in order to determine whether any *incompetence, misconduct, unskillfulness* or willful violation of law *on the part of any* licensed officer, pilot, seaman, employee, *owner or agent* of such owner of any vessel involved in such casualty, or *any inspector, officer of the Coast Guard*, or other officer or employee of the United States, or *any other person*, caused, or contributed to the cause of such casualty. * * * The investigation shall determine, as far as possible, the *cause of any such casualty* or accident, *the persons responsible therefor*, and whether or not the United States Government employees charged with the *inspection* of the vessel or the vessels involved and with the examination of the licensing of the officers thereof

have properly performed their duties in connection with such inspection, examination and licensing.' (R.S. § 4450, 36 Stat. 1167, 49 Stat. 1381, 50 Stat. 554, 60 Stat. 1097, 46 U.S.C., § ~~269~~; cf. 46 U.S.C., § 636.)

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Kalnin's testimony shows that a formal hearing was thereafter conducted by the Merchant Marine Investigating Unit of the United States Coast Guard, at Philadelphia, Pennsylvania, on May 1, 1954. It is a presumption of law, binding upon the Court and jury, in the absence of controverting affirmative evidence, that the Merchant Marine Investigating Unit of the United States Coast Guard performed its full official duty pursuant to the requirements of the statute. It is most significant that with full information with reference to the equipment and appliances in and about masthouse No. 2 aboard the steamship "Linfield Victory" and all of the circumstances which could be ascertained with respect to the cause of the death of Hutchison, the same agency of the government, the United States Coast Guard, reinspected and recertificated the same vessel in the identical condition in which it was on April 24, 1951. Thus, we have official findings of fact made by the United States Coast Guard Merchant Marine Investigating Unit, and the marine inspection unit, to the effect that the appliances in and about the ventilator shaft in masthouse No. 2 were in any event reasonably safe to life and had no causal connection with respect to the personal injuries which resulted in Hutchison's death.

A partial list of cases upon which appellant relies in support of its contentions under this subdivision is as follows: *Moore v. Chesapeake & Ohio R. Co.*, 340 U.S. 573, 95 L.Ed. 547; *Brady v. Southern Ry. Co.*, 320 U.S. 476, 88 L.Ed. 239; *Galloway v. U.S.* 319 U.S. 372, 87 L.Ed. 1458; *N.Y. Central R. Co. v. Ambrose*, 280 U.S. 486, 74

L.Ed. 562; *A. T. & S. F. Ry. Co. v. Toops*, 281 U.S. 351, 74 L.Ed. 896; *Northwestern Pacific Ry. Co. v. Bobo*, 290 U.S. 499, 78 L.Ed. 462; *Johnson v. Palmer, etc., R. Co.*, 120 F. Supp. 202, 220 F.2d 279, cert. den, 75 S.Ct. 883, 349 U.S. 954, 99 L.Ed. 1278; *Woods v. N.Y. Central R. Co.*, 222 F.2d 551; *Simpson v. Standard Oil Co.*, 223 F.2d 306; *Smith v. Arcadia Overseas Freighter*, 202 F.2d 141; *Repsholdt v. U.S.*, 205 F.2d 852; *Nagle v. Isbrandtsen Co.*, 177 F.2d 163; *Gibson v. International Freighting Corp.*, 173 F.2d 591; *Eckenrode v. Penn. R. Co.*, 164 F.2d 996; *Foster v. Moore-McCormack Lines, Inc.*, 131 F.2d 907; *Keiper v. Northwestern Pac. R.R. Co.*, 134 C.A.2d 702, 286 P.2d 47; petition of *personal representative* for a writ of certiorari, significantly *denied*, 100 L.Ed. 221; Wigmore on Evidence, 3rd Edition, Section 442; *Futterer v. Saratoga Ass'n. etc.*, 31 N.Y. Supp. 108.

(e) THE COURT ERRED IN GIVING INSTRUCTIONS; IN ITS INTERPOLATED COMMENTS IN RESPECT OF THE EVIDENCE AND, ALSO, EXTRANEEOUS MATTERS; AND IN REFUSING TO GIVE INSTRUCTIONS REQUESTED BY APPELLANT; IN REFUSING TO SUBMIT SEPARATE FORMS OF VERDICT OR A SPECIAL INTERROGATORY WITH RESPECT TO THE AVERMENT OF PARAGRAPH IX OF THE COMPLAINT; AND IN REFUSING TO SUBMIT APPELLANT'S REQUESTED INTERROGATORY NUMBER 3.

The assigned errors involved here are: 20, 24, 25, 26, 27, 28, 29, 30, 33, 34 and 35.

By reference thereto appellant incorporates herein and adopts as part of its affirmative argument, each of the foregoing assignments of error; the first, second, third and fourth sections of its objections and exceptions to the instructions and comments of the trial court and to the refusal of the trial court to give appellant's requested instructions (Specification of Errors, *supra*); and the oral proceedings in respect of the subject matter of paragraph

IX of the complaint from and including page 588, line 7 to and including line 23, page 591, Reporter's Transcript of Proceedings; T.R. pp. 347-350.)

Appellant contends that instructions to a jury should be simple, concise, direct, distinct, accurate, impartial, and confined to the genuine issues of material fact raised by the pleadings; and that if a trial judge exercises the privilege of commenting upon the evidence, such comments must be clearly and distinctly *separated* from that part of the charge which purports to state the law applicable to the case; and above all should be fair and impartial as between the parties. (*Sacramento Suburban Fruit Lines Co. v. McKew*, 36 F.2d 917, 919; *Lynch v. Oregon Lumber Co.*, 108 F.2d 283, 287; *Sperber v. Connecticut Mut. Life Ins. Co.*, 140 F.2d 25; *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 405; *McGlothlan v. Pennsylvania R. Co.*, 170 F.2d 121, 124-125; and *Home Ins. Co. v. Consolidated Bus Lines*, 179 F.2d 768, 772-773.)

If this Court will read the oral arguments of the respective attorneys to the jury, in the light of the evidence in the record, and compare the arguments with the instructions given by the trial court to the jury, it cannot fail to observe that the trial judge in his instructions and comments to the jury practically cut from under the appellant any possible chance of obtaining a jury verdict in its favor and validated the contentions of appellee's attorney on practically every disputed point. For example, in the opening argument of appellee's attorney, he went to great lengths in an effort to convince the jury that the accident occurred at or about 11:00 a.m. on April 24, 1951. When that argument was disclosed to be fallacious in the argument of appellant's attorney, appellee's attorney in his closing argument took the position that it was immaterial when or at what time the accident happened. The trial judge, in his instructions, erroneously

and arbitrarily told the jury the same thing and went even beyond the contentions of appellee's attorney by stating that *neither* the *date* nor *time* of the accident was material! (Assigned errors, 33(j) and 33(k).)

The trial judge also, for all practical purposes, nullified the clearly legitimate argument of appellant's attorney to the jury in respect of the right, as a question of fact, of appellant, *up to the time of the accident*, at least, to act and rely upon the assumptions that the government as the owner of the vessel had exercised ordinary care in supplying whatever appliances were required in and about the ventilator shaft to provide a reasonably safe place in which to work; and that the various Coast Guard inspectors had exercised at least ordinary care and correct official judgment in determining that the masthouse and its appliances were reasonably safe. The appellant had *actual* notice that these inspections had been made and resulted in the official determination of the *safety* of at least forty-five Victory ships. This was of vital importance with respect to whether or not the appellant, in the exercise of reasonable care prior to the accident, was required to *anticipate* that any ordinarily careful and competent able-seaman, in the full possession of normal faculties of perception, might in some mysterious but possible manner fall to the bottom of the ventilator shaft.

Judge Tolin also nullified the argument based on the uncontradicted evidence that the United States Coast Guard, after having conducted investigations *required by statute* to ascertain the cause of Hutchison's fall to the bottom of the ventilator shaft and with full knowledge of the fact that he had suffered death as a result of such fall, *subsequently* inspected the "Linfield Victory" and again issued a regular certificate of inspection without requiring the slightest change or alteration of the part of the vessel involved in this case. The trial judge ignored or misread

the unambiguous language of § ~~363~~, Title 46, U.S.C. which required the United States Coast Guard to *officially* ascertain whether *any* incompetence, *misconduct* or *unskillfulness* on the part of *any* person caused Hutchison's death; and to determine, as far as possible "the cause of any such casualty or accident" and "the persons responsible therefor." Thus, the purpose of the inquiries conducted by the United States Coast Guard at Philadelphia, on April 30 and May 1, 1951, was the same as the purpose of the inquiry during the trial of this action before the jury, to-wit: Was the death proximately caused by a negligent failure to supply sufficient appliances in and about the ventilator shaft in masthouse No. 2 of the "Linfield Victory" to provide a reasonably safe place in which to work? Judge Tolin was also apparently unaware of the *obvious* fact that the *sole purpose of the inquiries* made by the United States Coast Guard officers during their inspections of vessels, as a condition precedent to issuing an "under oath" certificate of inspection, is to determine whether the entire vessel, including all of its appurtenances and appliances, is at least reasonably safe. (Title 46, §§ 391, 399.)

The trial judge also nullified the argument of appellant's attorney in respect of the subject of negligence on the part of Hutchison by telling the jury that, in the opinion of the Court, the only possible basis of contributory negligence would be the *mere fact* that Hutchison, feeling "rugged" and with a "hangover", went about masthouses and climbed up and down ladders. He made no mention of the fact that the *manner* in which Hutchison went into or about the masthouse and the manner in which he may have gone up and down a ladder and the circumstances under which he did so were of vital importance in determining whether Hutchison was contributorily negligent, or was guilty of negligence which was the sole proximate cause of his death.

During the last session the trial court was presented with specific written questions prepared by the jury. He went way beyond the scope of the questions asked. The record shows affirmatively that the trial judge not only formed but expressed (in the absence of the jury) the opinion that plaintiff-appellee was entitled to recover a verdict. This Court will recall that during the statement of objections and exceptions to the charge the trial court said that he was of the opinion that Hutchison had a right to recover. This attitude on the part of the trial judge, in all probability, explains the one-sided nature of the instructions given and the comments with respect to matters entirely extraneous to questions of law which could have been applicable to the facts.

All of appellant's argument hereinabove with reference to the genuine issues of material fact raised by the pleadings and the subject matter of paragraph IX of the complaint is by reference thereto incorporated herein. (Argument, *supra*, (a), (a-1), (a-2) and (d).)

Immediately after appellant's attorney had completed his oral argument to the jury the trial court went into considerable detail in letting the jury know that no person could possibly know what might go on in the jury room. And that no one "can compel a juror to tell what went on in the jury room and *what the jury did and what the jury did not consider.*" (R.T. pp. 719-722; T.R. pp. 460-461.)

1. The matter set forth in assigned error 33(a) cannot be justified on the theory that it is either an instruction with reference to any matter of law involved in the case or the province or duty of a jury. It was, especially in the light of what the trial court had told the jury the day before, a clear invitation to the jury to be as arbitrary and capricious as it might choose to be. Appellant's requested instructions, assigned errors 34(a) and 34(b) are accurate and fair statements with respect to the province and duty

of a jury and should have been given in lieu of the language set forth in assigned error 33(a).

Appellant's requested instructions immediately hereinabove referred to were based upon California Jury Instructions, Civil, Nos. 1 and 6-A. Of course, the mere fact that suggested forms of instructions are set forth in California Jury Instructions, Civil, does not *ipso facto* establish their accuracy; but with respect to these two instructions there is no doubt that they are unimpeachable upon any possible ground. Therefore the trial court erred in giving the inaccurate instructions with respect to the duty and province of the jury and in failing to give appellant's requested instructions upon that subject.

2. In assigned error 33(a-1), the trial court initiated its erroneous expansion of the specific and sole issue of negligence. The only averment in the complaint on the subject of any breach of any duty proximately causing the injuries and death complained of is the averment in paragraph VIII: "That said injuries were directly caused by reason of the negligence of the defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work".

The record demonstrates that the trial court was determined to expand this sole and specific issue so that the jury could roam at will throughout the length and breadth of every possible factual basis of liability within the four corners of the Jones Act.

In assigned error 33(1) the trial court gave the jury a general definition of "negligence". This permitted the jury to decide against the appellant in the event it came to the conclusion that appellant did *any* act which a reasonably prudent person would not have done or failed to do *any* act which a reasonably prudent person would have

done. Every time the trial court used the word "negligence" in its instructions the jury was entitled to consider the same in the light of the general definition thereof which had been given to them. The issues were expanded, as far as it is possible to do so in the instructions referred to in assigned errors 33(h) and (i). No one can tell what the jury believed it could or could not do by the language "You are not to go beyond the *nature* of negligence which was charged" (Assigned error 30(w); or the language "the *type* of negligence that is alleged" (Assigned error 33(ee); or the language "the particular *kind* of negligence charged here" (Assigned error 33(ee)).

It is the contention of the appellant that the trial court should have told the jury distinctly, directly, concisely and without any equivocation or contradiction whatsoever that if the plaintiff had not proved by a preponderance of evidence that Hutchison died as a proximate result of a negligent failure on the part of the defendant to supply sufficient appliances in and about the ventilator shaft to provide a reasonably safe place in which to work, the verdict of the jury would have to be in favor of the defendant.

During the very last session, within an hour of the time the jury returned its verdict, the trial court stated to them as follows: "Now, when he died if he did not die *because of negligence* she has no claim. If he did not die *because of the particular kind of negligence* charged here she has no claim upon this defendant. But if he did die *because of the particular negligence*, which has been charged here, then her right accrued the moment he died." (R.T. p. 840; T.R. p. 560.)

The word "because" is not a definition of proximate cause. This language also revived, in the same paragraph, the general definition of "negligence"; and the instruction is therefore contradictory and conflicting within its own

language. There was no withdrawal of the instructions complained of in assigned errors 33(h) and 33(i). These conflicts and contradictions remained in the charge.

“Where the trial court has given an erroneous instruction, it may be withdrawn so as to overcome error which otherwise might exist. But the withdrawal must leave no doubt in the minds of the jury as to what the court ultimately declares the law to be. To be effective, the correction must be clear and specific.”

Seaboard Air Line R. Co. v. Bailey, 190 F.2d 812, 815-816.

The trial court, in the case at bar, did not at any time withdraw the instructions which erroneously expanded the sole and specific issue of alleged negligence on the part of the defendant.

Where the complaint alleges a specific negligent omission, the trial court must charge on said specific negligent omission and confine the issue to it. (*Atlantic Coast Line Co. v. Darden*, 216 F.2d 125, 128; *Consolidated Electric Co. v. Panhandle*, 189 F.2d 777; *Terminal R. Ass’n. v. Howell*, 165 F.2d 135; *Fleming v. Husted*, 164 F.2d 65; *Baer Bros. v. Palmer*, 158 F.2d 278; *Rashaw v. Central Vt. Co.*, 133 F.2d 253; *Illinois Central Co. v. Sitler*, 122 F.2d 279; *Schilling v. Del. & H. R. Corp.*, 114 F.2d 69; *Riley v. Sakow*, 110 F.2d 345; and *Carpenter v. Baltimore & Ohio R. Co.*, 109 F.2d 375.)

3. The instruction set forth in assigned error 33(c) is unquestionably erroneous and prejudicial. The jury had been told that its *duty* was to decide the questions of fact submitted to it. The first sentence of this instruction told the jury that “no expert and no certificate of inspection may suffice for your duty”. “Suffice” is defined in standard dictionaries as follows: “To be enough; to meet or satisfy a need; to be adequate or sufficient”. Appellant

does not contend that a certificate of inspection is conclusive. It is, however, quite clear that if the Court had correctly told the jury that the law presumes that United States Coast Guard officers who inspected the "Linfield Victory" and issued the certificate of inspection fully performed their official duties, and that such presumption was binding on the jury, in the absence of direct or indirect evidence to the contrary, then the certificate of inspection and what it stood for *could* have been enough to suffice for the performance of the jury's duty.

Appellant contends that no jury can approach its judgment or verdict *independently* of the testimony in respect of the experiences (observations) of any witness for either party or the experience of any other body or inquirer which has been the subject of testimony or evidence introduced. It is elementary that the verdict of a jury must be based upon the evidence in the case and can not be approached independently of such evidence. This particular instruction clearly invaded the province of the jury by instructing that the certificate of inspection and what it stood for was not sufficient to support a finding that the part of the vessel in question was reasonably safe. It also told the jury to disregard the experience of Captain Dyer who was the marine superintendent of appellant with reference to Victory ships, including his observation of the various inspections and to render a judgment and verdict independently of Captain Dyer's experience. Captain Dyer, as the agent of the appellant, was certainly justified in assuming that there was no insufficiency of appliances in and about the ventilator shaft when that particular part of each of these vessels had, on many occasions, been inspected and approved by qualified officers of the United States Coast Guard.

Related to the foregoing errors, appellant contends that they were compounded by the refusal of the Court to give

the instructions, or at least one of them, set forth in assigned errors 34(ww) and (yy). These instructions, requested by the appellant, would have clearly and correctly informed the jury of the law with reference to the evidentiary effect of the activities of the United States Coast Guard inspector and the certificates of inspection. They are based upon sections 363, 391 and 399, Title 46, U.S. Code; and are fully supported by the following authorities: *Armit v. Loveland*, 115 F.2d 308; *Sabine Towing Co. v. Brennan*, 72 F.2d 490; *Petition of Canadian Pacific Ry. Co.*, 278 F. 180; *O'Connor v. Armour Packing Co.*, 158 F. 241; and 32 C.J.S. page 502, § 640.

4. In spite of the fact that the part of the instruction referred to in assigned error 33(b) is set forth in B.A.J.I., this does not establish its accuracy. Appellant contends that while the burden of controverting the disputable presumption that Hutchison exercised ordinary care for his own safety and of proving his contributory negligence by a preponderance of evidence rested throughout the trial upon the appellant, nevertheless it was not required that appellant present any *affirmative* evidence with respect to those matters. The appellant was entitled to the benefit of all evidence offered by the appellee relevant to this subject. In any event, with respect to this particular element of burden of proof, appellant was entitled to its proposed instruction which is the subject of assigned error 34(ss). The authorities supporting appellant's contention in this respect are the following: 19 Cal. Jur. pp. 698-699 (cases cited in footnotes 13, 14, p. 699); *Blanton v. Curry*, 20 Cal.2d 793, 129 P.2d 1; *Soda v. Marriott*, 118 C.A. 635, 5 P.2d 675.

5. The instructions on the subjects of liability and contributory negligence are extremely one-sided. If the mere definition of "negligence" and "contributory negligence" (R.T. p. 776; T.R. p. 510; R.T. p. 778; T.R. p. 512) were

adequate with reference to the subject of contributory negligence, it is difficult to understand why the trial judge thought it was fair and impartial to point additional amplifications of the subject at the appellant, as follows: "A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work. To put the matter another way, the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended." (R.T. p. 773; T.R. pp. 507-508.) Nevertheless (Assigned error 34(qq)) the trial court refused to instruct the jury that "Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger." It is manifestly unfair to instruct a jury with particularity with respect to the duty imposed by law upon a defendant and refuse to instruct with respect to the duty imposed by law upon the person who has suffered an injury resulting in his death. The jury was not given *any* instruction upon the subject of the duty imposed by law upon him.

6. The instruction set forth in assigned error 33(e) should not have been given at all because Hutchison had actual notice of every condition in and about the area of masthouse No. 2 and all of said conditions were plainly obvious. Therefore he had no right to ignore the obvious physical facts or to assume that it was a reasonably safe place within which to work or to rely or act on that assumption if in fact it was not reasonably safe. This par-

ticular instruction is one which might be applicable *if* the question of *assumption of risk* were involved in the case. In any event if the trial court was justified in giving this particular instruction, the appellant was entitled to have its proposed instruction set forth in assigned error 34(qq) also given. (*Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525; *Nagle v. Isbrandtsen Co.*, 177 F.2d 163; and *Thompson v. Camp*, 163 F.2d 396.)

7. This point involves assigned errors 33(e), (n), (q), (r), (cc), (dd), and (ff).

Evidently the trial court was of the erroneous opinion that by *reading* the averments of paragraph VIII of the first count and paragraph II of the second count, it was *stating the issues* raised by the pleadings. The trial court should not have told the jury that either the deceased or the appellee had a *cause of action* with respect to any matter or thing. The trial court should have confined its instructions to a statement of the genuine issues of material fact. One way to have done this would be to read the averments of the complaint and then plainly tell the jury which of said averments were admitted and which were denied. The trial court could very easily have stated that each averment of the complaint which was denied in the answer of the defendant raised a genuine issue of material fact and that the burden of proving each of such denied averments rested exclusively and continuously upon the appellee. What the trial court did was particularly harmful to the appellant. The jury could not have avoided understanding from what the trial court stated to them, as shown by the assignments of error involved here, that a cause of action is

“a right of recovery; a right, which the law gives and will enforce, to recover something from another; the right to bring an action, suit, or judicial proceeding; the right to maintain an action upon the claim or matter included in it; the right to prosecute an action with effect.” (1 C.J.S. p. 983, § 8(d).)

The trial court delivered a lethal blow to any possible chance of the jury rendering a verdict in favor of appellant when he stated to them as follows: "*Her cause of action is based upon the fact that she has lost the support of that husband due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.*" (Assigned error, 33(ff).) In this connection, appellant respectfully requests this Court to consider what it would do with a similar instruction in the event it had been given, and the jury had rendered a verdict in favor of appellant. The assumed instruction is as follows: One of the defenses interposed here is *based upon the fact that Hutchison lost his life due to negligence on his part*, meaning that *he negligently and carelessly failed to act as an ordinarily prudent person would have acted under the same or similar circumstances and that such negligence was the sole proximate cause of his death.*

8. This point involves assigned errors 33(f), (g), (h), and (r).

The trial court plainly told the jury that if a "seaman" can establish negligence of the owners of the vessel, or her officers, agents or employees, then he has a right of action for damages. (Assigned error 33(h).) He also told the jury that this action against the Pacific-Atlantic Steamship Company was predicated upon the Jones Act; and that in the mere event of injury Hutchison was entitled to this right; and that all of these statements were likewise applicable to appellee's claim for damages by reason of the death. The trial court also told the jury, and this was of the utmost prejudice to the appellant, that *if* the jury decided "the second cause of action", it was to "*decide it in her favor for the damages which she has suffered.*"

The trial court on two separate occasions clearly and erroneously misdirected the jury with respect to the

claim for damages for death. He told them (assigned error 33(q) and assigned error 33(dd)) that paragraph II of the "second cause" constituted the charging part of the complaint and the "gist of the second cause of action." These instructions plainly told the jury that if Hutchison died as the result of his injuries and left the appellee surviving him as a dependent, then appellee was entitled to recover damages. Nothing could be more erroneous.

The trial court continuously and unnecessarily brought to the specific attention of the jury that the deceased was "a substantial contributor to her support"; and "she had been precipitated into the state of widowhood by that death"; and that the deceased was "the partial breadwinner of her family."

It is obvious that such continued suggestions by the trial court would have the effect of exciting the sympathy of the jury.

9. The jury came into court in an obviously confused state of mind at 10:23 p.m. on October 14, 1955, at which time the foreman presented to the trial court specific written questions. It was quite obvious that the jurors had not obtained a clear understanding of what the trial court was talking about in his previous instructions with reference to "the first cause of action" and "the second cause of action." They were also confused with reference to the extraneous issue involved in the "search for and discover" theory upon which they had been instructed. At that point, appellant contends that the trial court should have told the jury to disregard all of the instructions, with the exception of those which had been read from California Jury Instructions, Civil, and re-instructed the jury with respect to the law applicable to the genuine issues of fact raised by the pleadings. This should have included a clear and understandable state-

ment of the issues. Due to the lateness of the hour it would have been very proper to send the jury to a hotel and make a fresh start the next morning. Apparently on the theory that it was answering the question of the jury with respect to the "two causes of action", the trial court assumed, as an established fact, that "Mr. Hutchison was injured due to the negligent failure of the defendant to provide a reasonably safe place to work" and that there was a "failure to use reasonable care to maintain a reasonably safe place to work" and that "the 'Linfield Victory' did not use reasonable care to provide (the deceased) with a reasonably safe place within which to work."

No question was asked by the jury with reference to the subject of damages but the trial court went into that subject also. No mention was made of contributory negligence or negligence on the part of Hutchison which could have been the sole proximate cause of his injury and death. No question was asked by the jury with reference to how many suits for damages the appellee might maintain. The trial court erroneously and prejudicially stated to the jury as follows: "And there is only one law-suit in which she can collect, that is, she can't come back here next year and say, 'I want more.' * * * You just have to determine what the natural expectancies are and what sum of money can be awarded today on that second cause of action." A similar instruction was condemned as reversible error in the case of *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 406-407.

10. The errors involved here are those included within assignment 34.

Appellant is cognizant of the well established rule that no litigant is entitled, as a matter of right, to have a jury instructed in the precise language set forth in proposed instructions. On the other hand, every litigant is

entitled, as a matter of right, to have a jury accurately and fully instructed with respect to every proposition of law applicable to the genuine issues of material fact raised by the pleadings and evidence. If the trial court had charged the jury in accordance with the substance of the specific written requests of appellant, the jury would have been adequately, correctly and impartially instructed with reference to the issues pertaining to actionable negligence on the part of the appellant, contributory negligence on the part of Hutchison, negligence on his part as the sole proximate cause of his injury and death, the subject of disputable presumptions, and the vital element of foreseeability. None of these matters was adequately or correctly covered by the instructions actually given to the jury.

For example, the instruction that the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended (R.T. p. 773; T.R. p. 508) does not cover the subject matter of foreseeability in a manner in which it can be understood by a jury of laymen. Appellant's proposed instructions on this subject are fully justified and supported by the following authorities: *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193, 200; *Smith v. Lampe*, 64 F.2d 201, 202; *Sundberg v. Washington F. & O. Co.*, 138 F.2d 801, 803; and *Eckenrode v. Pennsylvania R. Co.*, 164 F.2d 996, 999.

There can be no doubt about the proposition that every litigant is entitled to specific instructions if the proposed instructions correctly state the law and are requested in writing. (*Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 433, 83 L.Ed. 265, 271; *Montgomery v. Virginia Stage Lines*, 191 F.2d 770; *Alaska Airlines v. Oszman*, 181 F.2d

353; *Southern Pacific Co. v. Sonza*, 179 F.2d 691; *Chicago, etc., Co. v. Green*, 164 F.2d 55; and *Madison v. White*, 52 F.2d 440.)

Appellant asserts and contends that each one of its proposed instructions which was refused by the trial court correctly and fairly states the law applicable to the genuine issues of material fact involved in the case and should have been given, either as requested or in language which would clearly cover the points of law involved. If the trial court had organized its instructions in accordance with custom and practice by reducing them to written form, instead of relying upon his memory, and giving many of them (as he stated) *out of his head and extemporaneously* (R.T. pp. 762-763; T.R. p. 499) much of the difficulty with respect to the subject of instructions would in all probability have been eliminated.

It is therefore respectfully submitted that the trial court committed prejudicial error in the instructions given to the jury, in the comments to the jury, and in the refusal to instruct in accordance with the written requests submitted by the appellant.

Appellant will now refer to certain of its proposed instructions which were refused by the court. Each number will be followed by authorities in support thereof. It was prejudicial error to refuse to give them.

Nos. 11, 11-A, 14, 14-A, 15, 15-A, 16, 16-A, 17, 31, 31-A, 32, 33 and 34, (45 U.S.C., §§ 51, 59; 46 U.S.C., § 688; *Atlantic Coast Line Ry. Co. v. Darden*, 216 F.2d 129; *Carstensen v. Hammond Lumber Co.*, 11 F.2d 142; *The Crickett*, 71 F.2d 61; *Shields v. United States*, 175 F.2d 743; *Larsson v. Coastwise Line*, 1950 A.M.C. 176, 181 F.2d 6; *Vileski v. Pacific-Atlantic S.S. Co.*, 163 F.2d 553); No. 24, (*California Code of Civil Procedure*, §§ 1961, 1963); No. 28, (*Cosmopolitan Shipping Co. v. McAllister*, 332 U.S. 783, 93 L.Ed. 1692; *Southern Shell*

Fish Co. v. Plaisance, 196 F.2d 312); Nos. 29, 30, 30-A, (*Adams v. American President Lines*, 23 Cal.2d 681, 146 P.2d 1); Nos. 32, 32-A, 35, 35-A, 36 and 36-A, (*Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193; *Smith v. Lampe*, 64 F.2d 201; *Sundberg v. Washington F. & O. Co.*, 138 F.2d 801; *Eckenrode v. Pennsylvania R. Co.*, 164 F.2d 996); Nos. 38, 39 and 49, (*Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 95 L.Ed. 547; *Galloway v. U.S.*, 319 U.S. 372, 87 L.Ed. 1458; *Woods v. N.Y. Cent. R. Co.*, 222 F.2d 551); Nos. 40 and 40-A, (*Shields, Larsson, and Vileski, supra*); Nos. 41, 52 and 53, (*Looney v. Metropolitan R. Co.*, 200 U.S. 480, 50 L.Ed. 564; *Keiper v. Northwestern Pac. R.R.*, 134 C.A.2d 702, 286 P.2d 47); Nos. 42 and 43, (*Vileski, supra*; *Nagle v. Isbrandtsen Co.*, 177 F.2d 163; *Lake v. Standard Fruit etc., Co.*, 185 F.2d 354; *Atlantic Coast Line R. Co. v. Dixon*, 189 F. 2d 525); Nos. 44, 44-A, 45, and 45-A, (*Smith v. Acadia Overseas Freighter*, 202 F.2d 141); No. 47, (*Shields, Larsson, Nagle, Vileski, and Dixon, supra*); No. 54, (*Chicago, etc., Co. v. Bowers*, 241 U.S. 470, 60 L.Ed. 1107; *Atlantic Coast Line R. Co. v. Darden*, 216 F.2d 129; *Shields, Larsson, and Vileski, supra*); Nos. 55 and 55-A, (*Atl., etc., Co. v. Dixon*, 189 F.2d 525); Nos. 56, 57 and 57-A, (*Chrismer v. Bell Telephone Co.*, 194 Mo. 189, 92 S.W. 378); No. 66, (*Sacramento Suburban Fruit Lands Co. v. Boucher*, 36 F.2d 912).

(f) THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION, IN THE ALTERNATIVE, FOR A NEW TRIAL.

The assigned errors involved here are: 8, 18, 19 and 21.

By reference thereto appellant incorporates herein and adopts as part of its affirmative argument, each of the foregoing assignments of error; and also its argument under subheading (d), *supra*, with reference to the "in-

sufficiency of substantial evidence on the vital subject of damage.''

It was the duty of the trial court to protect the appellant against the clearly unjustified findings that the total damage suffered by the appellee was the sum of \$50,000.00 and that negligence on the part of the deceased contributed only to the extent of ten percent of the total proximate cause. Appellant is aware of the proposition that ordinarily a United States Court of Appeals does not interfere with the amount of a verdict once it has been approved by a trial court. Appellant respectfully contends that, under the circumstances of this case, it is entitled to the protection of this Court against the clear abuse of discretion on the part of the trial court.

V.

CONCLUSION.

Appellant respectfully contends that it is entitled to a reversal of the judgment with directions to the trial court to enter judgment in favor of the appellant notwithstanding the verdict. If this Court concludes that such action is not warranted, then the least that should be done is that the judgment be reversed.

Dated, San Francisco, California,
September 17, 1956.

Respectfully submitted,

LASHER B. GALLAGHER,

Attorney for Appellant.

No. 15,091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,
Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of
Nathanael Patrick Hutchison, deceased,
Appellee.

APPELLEE'S BRIEF.

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No. 15,091.

IN THE

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FOR THE NINTH CIRCUIT

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,
Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of
Nathanael Patrick Hutchison, deceased,
Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment on a jury verdict for plaintiff rendered in the United States District Court for the Southern District of California, before the Honorable Ernest A. Tolin, Judge, in an action filed by plaintiff as administratrix and widow of Nathanael Patrick Hutchison, who died in April, 1951, in the course of his employment as an able-bodied seaman aboard the steamship Linfield Victory, operated by defendant, Pacific-Atlantic Steamship Company, a Delaware corporation. Jurisdiction of the cause below was based on Section 33 of the Merchant Marine Act of 1920 (46 U. S. C., Sec. 688), commonly known as the Jones Act, as implemented by Section 51 of the Federal Employers' Liability Act (45 U. S. C., Sec. 51).

This is the second appeal in this case. At the conclusion of the first trial a judgment had been entered in favor of defendant which was subsequently reversed by this Court and the cause remanded for a new trial. (*Hutchison v. Pacific-Atlantic Steamship Company*, 217 F. 2d 384.) At the second trial the jury rendered a verdict in favor of defendant on the first cause of action of the first amended complaint for conscious pain and suffering and a verdict for plaintiff in the amount of \$45,000.00 on the second cause of action for wrongful death. [Tr. pp. 573-574.]

The amended complaint alleged in the customary language of Jones Act pleading that appellant operated the steamship, Linfield Victory, in transportation of freight for hire by water in interstate commerce and that on April 24, 1951, Hutchison was in appellant's employment aboard that ship as an able-bodied seaman.

Nevertheless appellant has challenged the jurisdiction of this court and the court below on the ground that there are no allegations in the first amended complaint that appellant is a common carrier or that Hutchison was a member of the crew of appellant. In this connection, appellant does not assert that it was a "private" carrier rather than a "common" carrier; nor does appellant assert that deceased was not in fact a member of the crew. Appellant's argument on jurisdiction is simply that the United States District Court in both trials and this Court on the first appeal were wholly lacking in jurisdiction to determine the matter on the merits, because the complaint did not allege those two facts (*i.e.*, that appellant was a "common carrier" and that decedent was a member of the crew of a "common carrier").

The short answer to the "common carrier" contention is that the matter of whether or not appellant was a com-

mon carrier is wholly irrelevant to a consideration of an action brought pursuant to the Jones Act. No case cited by appellant supports its position on this point; indeed, none of appellant's cases involves an action under the Jones Act or discusses that Act. The only case appellee's research has disclosed in which the argument was made that the coverage of the Jones Act is restricted to common carriers is *Ziegler v. Alaska Portland Packers' Ass'n*, 135 Ore. 359, 296 Pac. 38, and there it was summarily rejected, the Court stating at 296 Pac. 40:

"We have found no case which construes this statute in such a restricted manner, nor do we find any language in any decision which lends support to such an interpretation."

The Federal Employers Liability Act is not to be taken as a rigid pattern for all rights granted by the Jones Act. *Taylor v. Atlantic Maritime Co.*, 179 F. 2d 597, 600. The Jones Act gives a right of recovery to the seaman as such, *Correia v. Van Camp Sea Food Co.*, 113 Cal. App. 2d 71, 248 P. 2d 81, 86, on any vessel, whether or not a "common carrier," plying in navigable waters, *McKie v. Diamond Marine Co.*, 204 F. 2d 132, 135-136. This includes even such vessels as a derrick anchored in the river for pouring concrete into forms, *Summerlin v. Massman Const. Co.*, 199 F. 2d 715, 716; and a dredge, *Early v. American Dredging Co.*, 101 Fed. Supp. 393, 395. The complaint alleged in effect, that Hutchison was employed as a seaman on the Linfield Victory, a vessel plying navigable waters; no more is required.

Equally unmeritorious is the contention that the Court lacked jurisdiction because the complaint did not allege that Hutchison was a member of the crew. Again, none of appellant's cited cases so holds. The allegation of the

amended complaint that Hutchison was employed as an able-bodied seaman aboard the Linfield Victory, would be a sufficient allegation if one were required, since the Jones Act concept of seaman now includes only one who is a member of the crew. *McKie v. Diamond Marine Co.*, 204 F. 2d 132, 135-136. But, in fact, whether Hutchison was a member of the crew is not a jurisdictional issue. In *Schantz v. American Dredging Co.*, 138 F. 2d 534, a dismissal of the complaint for lack of jurisdiction, on the ground that plaintiff was not a member of the crew was reversed, the court stating at page 536:

“Whatever may be the conclusion upon the question of whether plaintiff was a member of the crew, the issue is not one of ‘jurisdictional fact’ The court had jurisdiction to hear and decide the question, regardless of which side won the decision.”

The same holding was reached in *McKie v. Diamond Marine Co.*, *supra*, 204 F. 2d 132, 136.

Thus the argument that because of alleged omissions in the pleadings the trial court lacked jurisdiction to hear both the first and second trials and that this Court lacked jurisdiction to reverse the judgment on the first appeal, is shown to be groundless.

Statement of the Case.

Appellant’s lengthy Statement of the Case (App. Op. Br. pp. 6-45) is cast as an argument for appellant rather than a statement of the facts. There was ample evidence to support the verdict of the jury, and appellee here sets forth facts showing that the verdict was so supported.

Nathanael Patrick Hutchison was in the employment of appellant on April 24, 1951, as an able-bodied seaman with maintenance duties aboard the S.S. Linfield Victory

[Tr. p. 166], a vessel then operated by appellant. [Tr. p. 269.] At 8:00 o'clock, on that morning, while the ship was in Baltimore, Hutchison and several other seamen were ordered to clean the tween deck of No. 3 hold. [Tr. pp. 131, 166-167, 200.] In descending to and ascending from the work area the men used, as they were supposed to do, an iron ladder in an access shaft in masthouse No. 2. [Tr. pp. 132, 207, 212-214.]

A reference to Plaintiff's Exhibit 12 (diagram of the masthouse) and Plaintiff's Exhibits 1 through 11 (photographs) furnishes a description of the masthouse where decedent met his death far better than any verbal description. As this Court succinctly stated in the prior opinion on appeal, "The ventilator shaft was uncovered and unlighted." (217 F. 2d 384.)

There were no electrical installations in the masthouse. [Tr. p. 266.] There was testimony that it is a custom aboard ship to thoroughly illuminate any area in which men are working. [Tr. p. 232.]

Several witnesses testified to the inadequate visibility inside the masthouse, whether the masthouse door was open or closed.

Kent Stephen Castle, Jr., a master of steam vessels with unlimited license, testified that in May, 1951, when he went aboard the Linfield Victory, it was quite dark in the masthouse with the door closed in the late forenoon. [Tr. p. 222.] John Hutchison testified that on May 27, 1951, he visited the Linfield Victory and went into the masthouse; that it was a bright day; that with the door closed it was absolutely dark in the masthouse; that with the door open, it was easy to see as soon as his eyes became accustomed to the relative darkness inside coming from the sunlight outside; that one had to get accus-

tomed to the darker light coming in from a bright light; that when he was inside the masthouse he could see the ladders with the door half-way open—any light would show the ladders; and that he saw no lights or light fixtures or any place where light fixtures had been in the masthouse. [Tr. pp. 283-289.] George E. Wise, one of plaintiff's attorneys, called by plaintiff merely to identify the manner in which the photographic exhibits were obtained, was questioned by appellant extensively on cross-examination about conditions of visibility. He testified on such cross-examination that he visited the Linfield Victory on May 10, 1952, opened the door to the masthouse and looked inside; that with the door open in broad daylight, without any other kind of light inside the masthouse, it would be like looking into a closet with the door open; that he could see that there were things such as pipe railings but could not see anything clearly, as if there were lights on; that he did not look specifically to see whether there were openings in the masthouse floor for a ladder or anything like that—he had no recollection of seeing them before going inside to look for them; that standing at the door of the masthouse with the door open and with the daylight present on that day, he thought he could have seen openings in the deck of the masthouse. [Tr. pp. 168-177.]

While Henry C. Dyer, appellant's marine superintendent, testified in effect that the lighting was adequate, although diminished [Tr. pp. 323, 327, 329], Kenneth Albert Webb, a marine surveyor also called by appellant, testified that when he went aboard the Linfield Victory

to make a survey he asked to have lights put in the masthouse during the time of the survey; that the light inside the masthouse was so diminished that to do this surveying properly, he needed lights. [Tr. pp. 251, 252.]

There was also testimony regarding the inadequacy of protection against the open ventilator shaft for seamen using the adjacent access ladder. As shown by photographs [Pltf. Exs. 9 and 10] and by the diagram of the inside of the port compartment of masthouse No. 2 [Pltf. Ex. 12], the ventilator shaft in which Hutchison's body was found was inside masthouse No. 2, immediately adjacent to the access shaft containing the ladder used in going to and from the tween deck area. The two shafts are separated by a metal bulkhead, and the ladder is fastened to that bulkhead. The ventilator shaft was open and uncovered with two pipe railings around it, one 42½" above deck level and the lower railing about half way between the deck and the upper railing. There was a similar ventilator shaft in the starboard compartment of masthouse No. 2, shown in the photograph, Plaintiff's Exhibit 4, which was completely covered by a vertical metal bulkhead, so that unlike the one of the port side, it had no opening. [Tr. p. 233.] In other words, the starboard ventilator shaft was "not available" because of the bulkhead. [Tr. p. 327.] On other ships heavy screens had been placed over similar ventilator shafts to exclude the dangerous area where it was near an area of access. [Tr. pp. 142-143, 233-235.]

Hutchison worked in the tween deck hold for at least part of the morning on April 24, 1951. Amundsen saw

him leaving the hold at about 11:00 o'clock that morning and did not see him alive again [Tr. p. 135], with the possible exception that the witness was not altogether sure he did not see Hutchison at lunch. [Tr. p. 151.] In any event, the witness did not see Hutchison come back to the hold after he left at 11:00 o'clock. [Tr. p. 151.] Hutchison was seen by the witness Kalnin coming out of the masthouse containing the access ladder at lunch time. [Tr. pp. 190, 206-207.] The witness saw Hutchison last either in the messroom [Tr. p. 209] or on the companionway coming from the messroom. [Tr. p. 208.] Hutchison did not return to work with the other men at 1:00 P.M. nor at any time thereafter. [Tr. pp. 152, 208.] His absence was noted at 1:00 o'clock [Tr. p. 152], and a search made for him in the fore-castle and the messroom; but no general search of the ship was made, because it was assumed he had gone ashore to take a day off. [Tr. p. 191.] On April 25, Hutchison did not report for duty. [Pltf. Ex. 15.] On April 26, he was still absent from duty, and the Chief Mate telephoned the Baltimore police to inquire whether he was being held in custody. The police reported that a check of all precincts showed no one by that name being held. No other effort was made to ascertain his whereabouts. [Ex. 15.] Another seaman was obtained, and the Linfield Victory left Baltimore shortly thereafter, arriving at Philadelphia on April 29. [Ex. 15.] On April 30, 1951, Hutchison's body was discovered by the Chief Electrician at the bottom of the ventilator shaft in No. 2 masthouse, where the men had been working on April 24th. [Tr. pp. 190-191; Ex. 15.]

ARGUMENT.

1. The Motions for Directed Verdict and Judgment Notwithstanding the Verdict Were Properly Denied.

Appellant's assignments of error here are based on an alleged insufficiency of the evidence to prove: That appellant failed to provide a safe place to work; that Hutchison was acting in the course of his employment at the time of his injuries; that Hutchison's negligence was not the sole cause of his death; and that the amount of damages was proper.

A. Hutchison Was in the Course of His Employment at the Time of His Injuries and Death.

Appellant argues, what no one would deny, that at the time he suffered his injuries Hutchison was required to be in the course of his employment and implies that appellee was required to produce direct evidence showing the precise time at which Hutchison fell into the ventilator shaft. In the nature of the case—a fall resulting in death, unwitnessed and undiscovered for 6 days—evidence of the precise moment at which Hutchison fell into the shaft was unobtainable. Ample evidence was presented from which the jury could infer that Hutchison suffered his injuries and death between 11:00 A.M. and 1:00 P.M., on April 24, 1951. It was certainly within the province of the jury to draw such an inference. (*Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35; *Lavender v. Kurn*, 327 U. S. 645, 653.) And there can be no doubt that during those hours he was in the course of his employment, whether ascending or descending

the ladder, before or after lunch. A seaman is in the course of his employment when returning to his quarters after securing a drink of water (*Holm v. Cities Service Transportation Co.*, 60 F. 2d 721, 722); returning to his quarters after filling a bucket of water with which to wash (*State Steamship Co. v. Berglann*, 41 F. 2d 456, 457); occupying the sleeping quarters provided for him (*McCall v. Interharbor Navigation Co.*, 156 Ore. 252, 59 P. 2d 697); remaining on deck while off duty (*Sunberg v. Washington Fish and Oyster Co.*, 138 F. 2d 801, 803); and borrowing bread from another vessel for a customary late hour snack (*Thompson v. Eargle*, 182 F. 2d 717). In fact, it has been held that a seaman continues in the course of his employment when departing from his place of work, and, therefore, an injury while using a ladder to leave his ship has been considered an injury in the course of his employment. (*Wong Bar v. Suburban Petroleum Transport Co.*, 119 F. 2d 745.)

Appellant attacks the right of the jury to draw inferences as set forth in the *Lavender* case, *supra*, arguing that it stands alone and has been repudiated by later decisions. But *Lavender* was followed on this point in *Reck v. Pacific-Atlantic Steamship Co.*, 180 F. 2d 866, and as recently as April, 1956, was cited with approval on the point by the Supreme Court in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 610, 100 L. Ed. (Adv. pp. 430, 432), where the Court said:

“Fact-finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.”

B. There Was Substantial Evidence to Support the Finding That Appellant Did Not Furnish Hutchison a Safe Place to Work.

Appellee has summarized in its statement of the case the evidence showing that the port compartment of No. 2 masthouse was unlighted and the visibility inadequate, and that the ventilator shaft was uncovered and insufficiently guarded. Certainly this evidence, viewed most favorably to the jury verdict, would support findings that even with the masthouse door open there was inadequate visibility in the unlighted masthouse, and that with the door closed the masthouse was dark; and the jury was likewise entitled to find that, since every time a seaman went up or down the ladder he hovered over a ventilator shaft, the railings of which were wide enough to allow his body to pass through them, it was negligence not to take the simple, relatively inexpensive step of placing a screen over the shaft or erecting a bulkhead like that in the starboard compartment. It is obvious that a seaman climbing the ladder rapidly in an inadequate light could unknowingly reach the top of the ladder and simply by inertia be carried over the top of the bulkhead and down into the ventilator shaft; or that a seaman entering the masthouse to go down the ladder could misjudge the location of the ladder in the inadequate light, lose his balance and fall over or between the railings into the ventilator shaft.

It is settled that the trier of fact may find a negligent failure to provide a safe place to work where an area is inadequately lighted (*Lahde v. Soc. Armadora Del Norte*, 220 F. 2d 357; *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784; *The Wearpool*, 112 F. 2d 245); or where there is insufficient protection around open areas (*Desrochers v. United States*, 105 F. 2d 919; *Johnson v. Griffiths S.S.*

Co., 150 F. 2d 224; *Helmke v. United States*, 8 Fed. Supp. 521).

The evidence that one could see in the masthouse and that the railings were sufficient protection, so strenuously argued by appellant, merely raised conflicts for the jury to resolve. The same is true of appellant's speculations that Hutchison may have hit his head on the masthouse door and fallen over the railings. (App. Op. Br. pp. 168-169.) In *Schulz v. Pa. R. Co.*, *supra*, 350 U. S. 523, a tug fireman employed by respondent disappeared during his night duty hours and was found several weeks later, drowned. He was last seen walking toward the nearest of four tugboats on which he was assigned to work. There was some ice on the tugs. Three of the tugs were wholly unlighted; one partially illuminated by spotlights from the pier. Appellant had to tend all four tugs because of inadequate personnel. The Court reversed a judgment of dismissal, stating:

“[T]he courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For ‘The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.’ ”¹

¹In a footnote the court added: “Conversely, ‘It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.’ ”

Appellants apparently would have this Court take judicial notice that pipe railings identical with those surrounding the ventilator shaft were standard equipment and, as a matter of law, met the standard of reasonable care, citing *Desrochers v. United States*, 105 F. 2d 919, and *Vileski v. Pacific-Atlantic S.S. Co.*, 163 F. 2d 553. The *Desrochers* case is in fact a judgment for plaintiff for failure to maintain a safety rope around a deep tank into which plaintiff fell. *Vileski* involved improper use by a seaman of railings normally used as handrailings on the side of boilers. (The seaman stood on the handrails, fell off, and was injured.) There is no finding in either case that any kind of railing or other guard is, as a matter of law, a standard or customary or sufficient safety appliance. The determination of the sufficiency of any safety appliance should be for the jury, whenever there is evidence that other and better devices are reasonably available to the employers. Certainly a clearer issue for the jury could scarcely be found than in this case, where every trip up or down the ladder exposed men to the ventilator shaft and where a simple, economical screen or bulkhead (such as the bulkhead installed by the appellant around the starboard ventilator shaft) would have prevented the accident.

Appellant challenges the contention made by appellee's counsel in argument that an employer is required to exercise reasonable care to make a place reasonably safe even if "such an act entails doing something which coincidentally makes the place absolutely safe." This argument does not impose a duty to make a place absolutely safe. Appellant would apparently argue that if a place can be made reasonably safe only by making it absolutely safe, an employer is for that reason free to leave it unsafe.

Appellant argues, without authority, that, because the Linfield Victory had been inspected by government agents, it is a presumption of law that those agents discharged their duty and exercised ordinary care, it is a presumption of law that the vessel was in class A-1 condition, and it is a presumption of law that the masthouse appliances were standard and customary equipment; and it argues that appellant was entitled to rely and act upon the assumption that the government, and its agents, had fully performed all their obligations and duties. The unsupported assertions of presumptions may be passed over, since appellant's contention that it was entitled to rely on the government inspections is simply incorrect. Government inspection certificates constitute evidence of due care and nothing more. They do not relieve the ship owner of his responsibility to provide a reasonably safe place to work, as the very cases cited by appellant at page 180 of its Opening Brief affirm.

"The inspection certificates on which appellant relies so strongly are of course evidence bearing on the question of due care, but they are not more. . . ."

Sabine Towing Co. v. Brennan, 72 F. 2d 490, 494.

"It is difficult to admit that the fact of an appliance having been pronounced sound by an official inspector should be deemed to preclude the jury from considering whether his inspection was really an adequate one."

O'Connor v. Armour Packing Co., 158 Fed. 241, 249.

Finally, appellant argues that the constant use of the ladder by Hutchison and other seamen demonstrates that they considered it a safe place to work. The evidence was that there were only two ways in which men could get into or out of No. 2 hold that day: by the ladder in the

masthouse or the ladder at the aft end of Hatch No. 3. [Tr. pp. 202-205.] The testimony of Kalnin clearly established that the ladder at the aft end of Hatch No. 3 was between the winches and that the winches were in use on April 24, 1951. When the winches were in use the seamen were not supposed to use the ladder by the winches; the ladder in the masthouse was to be used "so you don't get hit with the winches loads"; during such times seamen were not supposed to use the one by the winches. [Tr. pp. 213-214.] It cannot reasonably be argued that where seamen have only one ladder to use, they certify by their use that it and the area about it is a safe place to work.

C. Hutchison's Contributory Negligence Was Not the Sole Cause of His Injuries and Death.

Appellant argues that Hutchison's contributory negligence in using the masthouse ladder was the sole cause of his fall into the ventilator shaft, since, as appellant speculates, if Hutchison had watched his opportunities, he could have gone up the ladder in the aft end of No. 3 hatch while the winches were stopped. As stated in the preceding paragraph, the ladder at the aft end of Hatch No. 3 was not readily available during this period and the ladder in the masthouse was the only available route. For that reason *Bohannon v. United States*, 92 Fed. Supp. 700, cited by appellant, is not applicable. There a seaman had a free choice of three routes to take to a particular part of the ship, one absolutely safe, one reasonably safe, and one very hazardous. The libellant took the hazardous route, and his injuries, when he was struck by a heavy wave, were held caused solely by his own recklessness.

That is not this case. The distinction is clearly made in *Rouchleau v. Silva*, 35 Cal. 2d 355, 217 P. 2d 929, wherein appellant's counsel in this action unsuccessfully urged the same argument upon the California Supreme Court. There a seaman, having a choice of two routes to a bait tank, used a plank instead of a ladder, but the evidence established that the plank was used as decedent had used it "at all times and under all circumstances whenever the men had occasion to go between the bait tank and the raised deck." (Pp. 360-361.) The Court, in affirming a judgment for plaintiff, rejected appellant's argument that it was the decedent's duty to go the safe way by the ladder and that his failure to do so was the sole proximate cause of his injuries. The Court stated at page 361:

"[T]he rule is applicable when it is shown to be the duty of the employee to use the ordinary and safe way rather than one intended for an entirely different purpose. Here it was shown that the plank was the ordinary way; that it was expected that the men would use it at any time for the purpose of going across the four-foot space between the bait tank and the raised deck; and that during cleaning up activities after unloading it was the regular practice for the plank to be in place and in use while the skiff was still in the water."

To the same effect is

Marceau v. Great Lakes Transit Corp., 146 F. 2d 416, 418.

Hutchison being deceased, appellee was entitled to the presumption that he had used due care. The jury weighed the question of contributory negligence on the evidence and the presumption and concluded that Hutchison was

contributorily negligent, to the extent of 10%. The verdict shows a careful and conscientious weighing of a disputed issue of fact and a finding supported by evidence.

D. The Evidence of Appellee's Damages Was Sufficient to Support the Verdict.

The evidence respecting damages was that Hutchison earned an average of from \$350 to \$370 per month, as a rough estimate [according to the witness Kalnin, Tr. p. 197], and that in 1950 his gross wages were \$4,705.96, on which income tax of \$581.65 was withheld. Mrs. Hutchison testified as follows regarding Hutchison's salary:

“Q. Mrs. Hutchison, did Mr. Hutchison in any way contribute to your support? A. Yes, whenever he came off a trip he would give me around seventy-five percent or thereabouts of his money. And he kept the rest, and we decided where to put it and what to do with it.

Q. The jury cannot hear you. A. I am sorry. I said he would give me around seventy-five percent of his wages and kept the rest and that—well, we disposed of it, however we did, in the bank or whatever we wanted to do with it. You know, like any other family does.

Q. That was his consistent practice? A. Yes, it was.” [Tr. pp. 262-263.]

This evidence related directly to the measure of damages.

“The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.”

“The amount of contribution by the decedent during his lifetime to the claimed beneficiary has a direct bearing on the issue of reasonable expectation of pecuniary benefit.”

Cleveland Tankers, Inc. v. Tierney, 169 F. 2d 622, 624.

Even if the 75% which Mrs. Hutchison testified her husband gave her was the only loss of pecuniary benefit derived by her from his earnings—and Mrs. Hutchison’s testimony indicates that in fact they disposed of the remaining 25% for their mutual benefit—appellant calculates that this amount, \$3,084.22, multiplied by the 19-year life expectancy of Mrs. Hutchison, would equal \$58,600.18. (App. Op. Br. p. 166.) The jury determined appellee’s damages to be \$50,000.00, demonstrating that they substantially discounted the higher figure. Appellant’s assertion (App. Op. Br. p. 166), that the present value of an annual annuity of \$3,084.22 “is considerably less than \$50,000.00,” is unsupported by any evidence in the record or elsewhere, since appellant’s counsel introduced no evidence on the subject, did not cross-examine appellee regarding the benefit she received from Hutchison’s salary, offered no instruction on damages, advised the jury he did not intend to argue damages, and made only a passing reference to that subject. [Tr. pp. 393-394.] Appellant chose to ignore the issue of damages, and appellee’s evidence on the subject supports the verdict. In *Louisville and N. R. Co. v. Holloway*, 246 U. S. 525, 528, the jury was instructed that plaintiff could recover “such an amount in damages as will fairly and reasonably compensate [her] for the loss of pecuniary benefits she might reasonably have received . . .” and the Appellate Court held that the jury was entitled to consider,

not merely what she would have received for maintenance and support, but what she would otherwise have received from her husband. An award for plaintiff was affirmed, and the Supreme Court further observed that the defendant had failed to offer instructions on this point.

2. The Court Did Not Err in Rulings on Evidence.

A. Rulings on Custom.

Appellant complains of the admission of Capt. Crawford's testimony, (1) that there was a custom "to account for the working hours and places" of the crew at all times [Tr. p. 229], and (2) that there was a custom "to thoroughly illuminate any area in which a man or men are working" [Tr. p. 232]; and of appellant's admission that there was no permanent electrical installation in No. 2 masthouse.

Preliminarily, appellant asserts, without citing authority, that custom must be pleaded if a claim of negligence is based on it. The contention is rejected in *Ass'd Lathing & Plastering Co. v. Louis C. Dunn, Inc.*, 135 Cal. App. 2d 40, 286 P. 2d 825, and *Covely v. C. A. B. Const. Co.*, 110 Cal. App. 2d 30, 242 P. 2d 87.

Crawford testified that he had had a master mariner's license for 40 years, had sailed practically all over the world in numerous capacities on steam, motor, and sailing vessels, and was, when testifying, the principal of and instructor in Crawford Nautical School. This was sufficient to qualify his testimony as to a custom. (*Burke v. John E. Marshall, Inc.*, 42 Cal. App. 2d 195, 203-204, 108 Pac. 738, 743, action for damages for personal injuries by a stevedore.)

“During the course of the trial the plaintiff was permitted to testify over objections that during his eight years of work on the docks as a stevedore it was the custom of the operators to blow the horn of the lumber carriers when they were about 25 feet away from any men working on the dock. The contention of defendants that the court committed prejudicial error in permitting such testimony as to custom cannot be sustained. When the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent.” (P. 203.)

Thomas v. So. Pac. Co., 116 Cal. App. 126, 2 P. 2d 544;

Miller v. Midway Fishing Tool Co., 106 Cal. App. 2d 612, 614, 235 P. 2d 630.

Appellant's admission regarding lack of lighting installations in No. 2 masthouse and Crawford's testimony on the custom regarding illumination were properly received, since other evidence, summarized in appellee's statement of the case, showed that without artificial illumination, there was insufficient visibility in the masthouse.

B. Rulings on Protective Devices on Other Ships.

The witness, Amundsen, testified that he had had 22 years' experience at sea as an A.B. [Tr. p. 130.] He had been on other ships that had access ladders in the masthouse. [Tr. p. 139.] He identified Plaintiff's Exhibits 1 and 2 as photographs of the No. 2 masthouse, including the ladder, the access shaft, and the ventilator shaft. [Tr. pp. 138-140.] *Looking at those photographs and pointing to the ventilator opening*, he testified that

other ships he was familiar with had screens over that opening [Tr. p. 142], in addition to railings encircling both access and ventilator shaft. [Tr. pp. 155-156.] The fact that the screens on other ships were specifically identified as being on ventilator shafts would, we submit, be a sufficient showing of similarity, but in addition Amundsen's testimony was directly related to the photographs, Plaintiff's Exhibits 1 and 2, and was in effect that he had seen screens on similar ventilator shafts adjacent to similar access shafts in similar masthouses.

Crawford's testimony regarding screens was cumulative to Amundsen's. He was familiar with the construction and design of victory ships [Tr. p. 226] and had been aboard about five [Tr. p. 235] although he had not visited the masthouse on all of them. [Tr. p. 235.] He, too, was shown photographs of the masthouse, including Exhibits 2, 4 and 7. With his attention directed to Exhibit 2 he was asked whether in his experience he had ever seen any other protective devices around the ventilator shaft, and he testified that he had seen "a heavy screen which excludes the danger" when there was an area of access close to it or in the vicinity. [Tr. pp. 233, 234.] Again, this testimony was restricted to ventilator shafts similar to those in the photographs.

Such evidence is admissible in negligence cases on the issue of due care or negligence under the circumstances.

"The conduct of others evidences the tendency of the thing in question; and such conduct . . . is receivable with other evidence showing the tendency of the thing as dangerous."

2 Wigmore, Sec. 461, p. 489.

The cases so hold. (*Deshotel v. Santa Fe Ry. Co.*, 144 A. C. A. 227, 230-231, 300 P. 2d 910, 912-913 (jury

viewed intersections similar to one where accident occurred); *Jensen v. So. Pac. Co.*, 129 Cal. App. 2d 67, 74, 276 P. 2d 703, 708 (grade crossing accident; evidence of gates at similar crossings admitted); *Thurman v. Clune*, 51 Cal. App. 2d 505, 125 P. 2d 59 (evidence of safety practices at other ice hockey rinks admitted).)

Appellant's argument is, in fact, a demand for a showing of identical circumstances before admitting evidence of practices elsewhere, but

“Identical conditions will rarely be found. Substantial similarity is normally sufficient. Determination of relevancy, including similarity of conditions in such a case is primarily the function of the trial judge.”

Jensen v. So. Pac. Co., *supra*, 129 Cal. App. 2d at p. 74, 276 P. 2d at p. 708.

3. The Trial Court Properly Refused to Strike Paragraph IX of the Complaint Which Alleges Negligence in Failing to Search for Decedent, and Appellant Was Not Prejudiced by the Instructions Thereon.

Appellee submits that the record shows that not only was no error committed by the trial court in refusing to strike paragraph IX of the complaint alleging negligence based upon a failure of appellant to search for decedent, but that in fact appellant was accorded more than its due by the instructions of the trial court on the subject.

Both causes of action of the First Amended Complaint alleged that Hutchison had fallen into the ventilator shaft because of appellant's negligence in failing to provide him a safe place to work and, in paragraph IX, that he remained in the ventilator shaft for six days because of the further negligence of appellant's personnel in failing to conduct a search for him.

The trial judge instructed the jury that in deciding the issue of negligence on the *first* cause of action for conscious pain and suffering they might consider both appellant's failure to provide Hutchison a safe place to work and the failure to conduct a search for him. It was on this cause of action that the jury rendered a verdict for the defendant.

The trial court also charged that in deciding the issue of negligence on the *second* cause of action for wrongful death, they might consider only appellant's negligence in failing to provide a safe place to work, taking from them the issue of failure to conduct a search. It was on this second cause of action that the jury rendered a verdict for the plaintiff.

Appellant asserts that the jury defied the instructions of the Court and considered failure to search on the cause of action for wrongful death. Recognizing that if the jury was entitled to consider failure to search, no prejudicial error results, appellant argues that the issue of failure to search was improperly included within either of appellee's causes of action for several reasons, which may be summarized as follows:

(a) The complaint failed to allege any proximate causal connection between failure to search and Hutchison's pain and suffering and death; (b) There is no evidence in the record showing a proximate causal connection between failure to search and Hutchison's pain and suffering and death; (c) An injury resulting from failure to search, like an injury from negligent case, is a non-statutory admiralty cause of action which does not survive to the personal representative. It could not come within the purview of the Jones Act because that Act is limited to injuries in the course of employment, and

Hutchison, from the time he struck the bottom of the ventilator shaft, was not in the course of his employment; (d) The allegation of failure to search should have been stated as a separate cause of action.

A. There Is Nothing in the Record to Show That the Jury Disregarded the Instructions of the Court.

If the jury followed the judge's instructions to disregard failure to search on the second cause of action for wrongful death, on which plaintiff recovered, it is immaterial whether the failure to search issue was before them on appellee's first cause of action relating to pain and suffering. The contention that the jury disregarded instructions is unfounded speculation. The sincerity of the jury in wanting to completely understand the legal withdrawal of this issue from their consideration was made apparent when they returned to the Court for further instructions on it. [Tr. p. 551.] Judge Tolin then gave a lengthy charge repeating his instruction that the issue must be disregarded. [Tr. pp. 551-560.] The foreman replied: "Your Honor, I feel sure that some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search" on the second cause of action and sought additional explanation. [Tr. p. 562.] Judge Tolin again complied, categorically and unequivocally instructing the jury that they could not consider failure to search on the second cause. [Tr. p. 563.] After concluding this and other instructions he asked:

"Now, members of the jury, have we answered the questions you had in mind?

Foreman Eager: Yes, sir.

The Court: It is after 11:00 o'clock. Do you want to work further on the case tonight or not?

I see some of you nodding affirmatively. We don't want to make you work when you are fatigued.

We will send you to a hotel if you desire. You can resume deliberations—

Foreman Eager: I think we would like to work for a little while." [Tr. pp. 571-572.]

There is simply nothing in this colloquy between judge and jury to justify appellant's statements that "some of the jurors were still determined to use this evidence . . ."; that the jurors had a "recalcitrant attitude"; that "if they would refuse to follow the instruction the first time it was given they would continue such refusal." (App. Op. Br. p. 132.) Much less is there any warrant for the statement that some of the jurors "were not willing to return a verdict in favor of appellee on the claim for damages by reason of the death upon the basis of a finding in favor of appellee in respect of the averred negligent omission set forth in paragraph VIII, . . ." (App. Op. Br. p. 130.) On the contrary, the expression by the foreman and the jurors that the Court had answered their questions and they wanted to resume deliberations amply supports the fundamental presumption that juries are composed of rational people capable of understanding and following the charge of the Court. (*Lasier Gas Engine Co. v. DuBois*, 130 Fed. 834, 838; 24 Cal. Jur. 795.)

B. The Issue of Failure to Search Was Properly Included in Both of Appellee's Causes of Action.

Appellee submits that both the pleadings and the evidence properly presented this question as part of the issue of negligence for the jury's determination on both causes of action of the amended complaint, so that no

prejudicial error could have resulted if the instructions of the Court had been disregarded. (*Lazier Gas Engine Co. v. DuBois*, *supra*, 130 Fed. at p. 839.)

Appellant's contentions regarding the failure to search issue are similar to those made by appellant in its brief on the first appeal of this case, and they were rejected by the decision of this Court reversing a directed verdict on that issue for appellant. This Court expressly declared, citing *The Black Gull*, 82 F. 2d 758, that appellee's two causes of action were recoverable under the Jones Act and survived Hutchison's death.

In any event the contention is untenable for the reasons that: (a) the proximate causal connection between failure to search and Hutchison's pain and suffering and death was sufficiently alleged in the complaint; (b) appellant is not in a position to argue that there was no evidence that a failure to search proximately contributed to the pain and suffering or death of decedent, because appellant elected not to include the medical testimony in the Transcript of Record; (c) the argument that a negligent failure to search for Hutchison is not within the purview of the Jones Act, because the incapacitated Hutchison was no longer in the course of his employment, is in the teeth of the cases; and (d) the element of appellant's alleged negligence in failing to search was a proper issue in each cause of action, and the trial court's instructions that the jury could consider that aspect of negligence only on the first cause of action highly favored appellant, according appellant more than it was entitled to.

The strained and devious argument of appellant puts appellee in the peculiar position of arguing at length matters which are material only if counsel's unfounded speculations are true that the jury disregarded the Court's

instructions and considered the matter of failure to search on the second cause of action, the only one on which plaintiff recovered. To pursue this argument on what must certainly be deemed moot points, we are required to point out that the pleadings were sufficient on an issue in fact taken from the jury and that appellant received more favorable treatment than it was entitled to on the issue. With these preliminary comments we turn to the task.

The first amended complaint alleged facts sufficient to show the proximate causal relation between the failure to search and the conscious pain and suffering and wrongful death. After alleging in paragraph VIII of the *first* cause of action that Hutchison sustained personal injuries and conscious pain and suffering in his fall into the ventilator shaft and that his injuries were directly caused by appellant's negligence in failing to provide him a safe place to work, appellee alleged in paragraph IX that appellant and its employees "were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall . . ." and in paragraph X "That as a result of the premises" Hutchison "sustained damages." In the *second* cause of action, after realleging paragraphs VIII and IX, appellee alleged that "as a result of said injuries" Hutchison "died at some time between the date of said fall . . . and the date on which" he "was discovered," and alleged damage to plaintiff as a direct consequence of the death. These alleged facts sufficiently show the proximate causal connection between the failure to search and the pain and suffering and death.

“[T]he well settled rule of pleading in negligence cases, although requiring a positive connection between the act of negligence and the injury to be alleged, does not require that the complaint aver in terms that such negligence was the proximate cause thereof if such connection appears by fair intendment from the facts alleged”

Moore v. Burton, 75 Cal. App. 395, 400, 242 Pac. 902.

To the same effect see:

Tucker v. Cooper, 172 Cal. 663, 668, 158 Pac. 181.

If anything, even greater liberality is indulged under Rule 8(a), Federal Rules of Civil Procedure, requiring the pleader to set forth merely “a short and plain statement of the claim showing that the pleader is entitled relief.” (See *Palum v. Lehigh Valley R. Co.*, 9 F. R. S. 12e.311, case 1; *Dioguardi v. Durning*, 139 F. 2d 774, 775.)

In any case appellant could not have been prejudiced by the pleadings. The very intensity and persistence of its attacks on paragraph IX reveal a clear knowledge of the claimed connection between the negligence there alleged and appellee’s injuries, and the jury was left in no doubt by the instructions that any claimed negligence of defendant must be a proximate cause of the damage claimed before they could render a verdict for plaintiff. [Tr. pp. 511-512.]

The allegation of a negligent failure to search was properly included with the allegation of a negligent failure to provide a safe place to work in one cause of action. A negligent failure to conduct a reasonable search for Hutchison clearly would constitute “negligence of any of the officers, agents, or employees” of appellant. (45

U. S. C., Sec. 51.) The shocking suggestion that it would not be actionable negligence under the Jones Act because the incapacitated Hutchison was no longer in the course of his employment is contrary to many decisions. (*Cortes v. Baltimore Insular Line*, 287 U. S. 367 (administrator recovered under Jones Act for failure to furnish care for seaman stricken with pneumonia), cited with approval on the point in *DeZon v. American President Lines*, 318 U. S. 660; *Harris v. Penn. R.R. Co.*, 50 F. 2d 867 (ship owner liable for failure to rescue member of crew who fell into sea); *Dinicola v. Pa. R.R. Co.*, 158 F. 2d 856, 857; *Curran v. Std. Dredging Co.*, 112 F. 2d 163.) In none of these decisions was the incapacitated seaman any more "subject to any call of duty" (App. Op. Br. p. 129) than was Hutchison at the bottom of the ventilator shaft.

The contention (also, we submit, moot) that the negligent failure to search should have been stated as a separate cause of action and that it was not proper to state in one cause of action negligence in failing to provide a safe place to work and further negligence in failing to search, where both proximately contributed to decedent's pain and suffering or death, is likewise contrary to law. (*Original Ballet Russe, Ltd. v. Ballet Theater Inc.*, 133 F. 2d 187, 189: "The fact that in pleading his claim the plaintiff has charged the defendants with accomplishing the harm by acts which viewed independently might themselves be deemed torts does not mean that he has alleged several causes of action which must be stated in separate counts"; *McCormick v. Moore-McCormack Lines, Inc.*, 54 Fed. Supp. 399, an action for personal injuries and for maintenance and cure, in which the defendant made a motion that plaintiff be required to state separately which injuries were suffered in the fall and

which from failure to provide cure. The motion was denied; *Chiavola v. Montgomery Ward & Co., Inc.*, 7 F. R. D. 85, 86.)

Appellant attempts the argument (again moot) that there is an absence of evidence in the record to show that failure to search proximately contributed to the damages claimed on either cause of action. (App. Op. Br. p. 123.) If appellant intended to make this argument, it was obligated to include in the record the medical testimony on the question whether Hutchison lived or experienced conscious pain and suffering after his fall. The arguments of counsel, which are in the record, reveal that such evidence was introduced. [Tr. pp. 380-384, 450-453.] Not having included that testimony, appellant may not now be heard to argue that there is no evidence of proximate causal connection from failure to search.

4. Appellant Was Not Prejudiced in the Statement of Objections to Instructions.

Appellant cannot seriously contend that it was prejudiced regarding the stating of objections to instructions. The trial court instructed the jury in less than an hour. [Tr. p. 528.] Appellant's counsel, although the Court attempted to restrict him to one-half hour for statement of objections [Tr. p. 528], took substantially longer than that [Tr. p. 546] and when he was admonished by the Court, the following colloquy occurred between Court and counsel:

“Mr. Gallagher: May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and that anything

which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, 'May I have a general exception upon the ground that the court committed error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court?'

The Court: A general exception is noted.

Mr. Gallagher: That is satisfactory to your Honor?

The Court: Yes.

Mr. Gallagher: Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court: I do not . . ." [Tr. pp. 546-547.]

All of these proceedings were outside of the presence of the jury. Appellant thus was granted a general exception to the Court's refusal to give its instructions and there was no possible ground for asserting prejudice.

Appellant also goes to extreme lengths in its brief (pp. 141-142) to assert that the trial court prejudiced the jury against appellant by its remarks prior to the stating of exceptions to instructions. Appellee considers any lengthy answer to these contentions unnecessary. The record amply demonstrates that Judge Tolin behaved with remarkable restraint, and impartiality, before the jury, in this as in all other phases of the case. We must, however, take exception to a misstatement of fact in appellant's argument, when it asserts that one of the judge's statements to the jury on the subject of jury instructions was announced "in an angry mood." (App. Op. Br. p. 141.) There is absolutely nothing in the record to indicate that that or any other statement was

made in the presence of the jury in an angry mood, and in fact the statement was made, like all of Judge Tolin's statements to the jury in this case, in a calm, dispassionate tone of voice and manner of expression.

Appellant further contends that Judge Tolin's conduct outside the presence of the jury revealed a "deep animosity . . . harbored against appellant's attorney." Appellant contrasts Judge Tolin's statements on October 14 regarding the intemperancy of his advocacy [Tr. p. 539] with the statement on the previous day that he had not felt moved to make any criticism of the conduct of appellant's attorney in the presence of the jury. [Tr. p. 354.] Appellant's counsel makes no mention that on the morning of October 14, after both sides had rested and after counsel had presented their opening arguments to the jury, appellant's counsel, in the presence of the jury, moved to reopen the case for the purpose of presenting additional evidence in response to a juror's question. [Tr. pp. 465-467.] It was after this wholly improper action by appellant's counsel that the remarks he complains of were made. In any event, whatever may have been the relationship between the Court and counsel (and it would be unreasonable to overlook that Judge Tolin must have had the opinion of this Court in the previous appeal from this action in mind in his handling of the second trial), the record abundantly shows a completely fair and impartial handling of the trial.

5. The Trial Court Fairly and Correctly Instructed the Jury on All Material Issues, and Committed No Prejudicial Error in Refusing to Give Appellant's Requested Instructions.

During the course of the trial both parties submitted numerous requested jury instructions to the Court. The Court concluded that counsels' instructions were excessively long and argumentative and determined to reject all offered instructions. [Tr. pp. 332-334.] At the conclusion of argument the Court formulated its own charge to the jury. [Tr. p. 494.] Appellant asserts numerous errors in the charge as given and in the failure of the Court to instruct according to its offered instructions.

It is settled that a party has no vested interest in any particular form of instructions. What the language of the instructions shall be is for the trial judge to determine. (*Cohen v. Evening Star Newspaper Co.*, 113 F. 2d 523.) If, considered as a whole, without isolating or separating portions of the charge, the instructions fairly and adequately presented the issues to the jury for its determination, the requirements of the law are satisfied. (*Van Camp Seafood Co. v. Nordyke*, 140 F. 2d 902, 908; *Casey v. Seas Shipping Co.*, 178 F. 2d 360, 362.) It is not prejudicial error to refuse to give a requested instruction, even though it be an accurate statement of law, if the issues have been fairly and correctly covered in the general instructions given. (*Thiringer v. Barlow*, 205 F. 2d 476, 477.) Moreover, even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a con-

sideration of the entire charge. (*United Electric R. & M. Workers of America v. Oliver Corp.*, 205 F. 2d 376, 387; *International Paper Co. v. Busby*, 182 F. 2d 790.) "It is unfair to the trial court to pick out certain portions of its charge omitting others which limit and qualify the same and then insist that the court committed error." (*Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 F. 2d 823, 835 (C. C. A. 6, 1941).) And a judge can modify or correct instructions, amplify his charge, and give additional instructions, on its own or counsel's motion. (*United States v. Hess*, 41 Fed. Supp. 197, 217; *Southern Pacific Co. v. Souza*, 179 F. 2d 691, 694; *Clarke v. United States*, 132 F. 2d 538, cert. den. 318 U. S. 789, 63 S. Ct. 992, 87 L. Ed. 1155.)

An examination of the portion of appellant's offered instructions contained in the printed transcript demonstrates the wisdom of their rejection by the Court. In its brief appellant says that "instructions to a jury should be simple, concise, direct, distinct, accurate, impartial, and confined to the genuine issues of material fact raised by the pleadings . . ." (App. Op. Br. p. 172.) Appellant submitted to the trial court over 70 instructions. The printed instructions cover 58 pages of the transcript. [Tr. pp. 24-81.] They are unnecessarily repetitive, contain inaccurate statements of the applicable law, and almost without exception are arguments for appellant. To take a single example, which we think typical, instruction No. 47 [Tr. pp. 64-65] on the duty of care required of Hutchison, omits all reference to the doctrine of comparative negligence and states: "If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff." While the

quoted formula is, in isolation, a correct statement of the law, the instruction as a whole would almost certainly lead the jury to think that if Hutchison was negligent appellee could not recover.

Appellant's attack on the charge given by the Court is characterized by unjustifiable distortions of the judge's language of which the following are illustrative:

(a) Appellant asserts that the judge instructed the jury that "*Neither the date nor time of the accident was material!*" (App. Op. Br. p. 173.) The Court actually said that "the *exact* day, the *exact* hour of the incident . . . the *exact* time is not material. The *exact* time of the events, . . . need not be spelled out in detail by the evidence" [Tr. pp. 509-510] and the Court immediately added: "Mr. Hutchison must have been injured while in the course of his employment, in order for Mrs. Hutchison to recover damages here." [Tr. p. 510.] This was, in effect, an instruction that the issue for the jury was not the exact time of Hutchison's fall but whether he was in the course of his employment, and, together with other instructions on this subject [Tr. p. 509], correctly states the law. (See *Schulz v. Pa. R. Co.*, U. S., 76 S. Ct. 608, 100 L. Ed. (Adv. p. 430).)

(b) Appellant charges the Court with having said that "The only possible basis of contributory negligence would be the *mere fact* that Hutchison feeling 'rugged' and with a 'hang-over,' went about masthouses and climbed up and down ladders." (App. Op. Br. p. 174.) A reading of the actual instruction discloses the unfairness of the paraphrase [Tr. p. 513] and refutes the contention. After discussing the issue raised by the testimony that Mr. Hutchison might have been feeling "rugged" or

had a “hang-over,” the Court instructed that if the jury found Hutchison guilty of negligence in that respect, “or if you find there was some other contributory negligence—at the moment as I sit here that is the only thing in the evidence which occurs to me, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was,” then the doctrine of comparative negligence was applicable. [Tr. p. 513.] This instruction cannot be twisted into a statement that a hang-over was the only possible basis of contributory negligence in the evidence.

(c) Appellant asserts: “The trial court plainly told the jury that if a ‘seaman’ can establish negligence of the owners of the vessel or her officers, agents, or employees, then he has a right of action for damages. (Assigned error 33(h).)” (App. Op. Br. p. 183.) We think no further refutation of this charge is necessary than a quotation of the instruction assigned as error 33(h):

“The *gist* of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove *negligence*, for unless the seaman can establish *negligence* of the *owners* of the vessel, *or her officers, agents, or employees*, no liability exists.” [Tr. p. 509.]

The instructions given by the trial judge fully and accurately charged the jury on all issues. Appellant’s attack on the instructions picks isolated statements out of context to assign as error, and overlooks portions of the charge to the jury which meet the objections. We will, therefore, take up seriatim appellant’s objections to the instructions, and cite the portions of the charge which meet the objections.

(1) Appellant charges that the instructions regarding the province of the jury as judges of the facts [Tr. pp. 493-494] were “a clear invitation to the jury to be as arbitrary and capricious as it might choose to be,” (App. Op. Br. p. 175), and asserts that the failure to give its instructions (assigned errors 34a and 34b) was error. The court, however, at least four times in his charge, told the jury of the limitations on their power in language which amply covered the matter requested by appellant:

“Your judgment, that is, your verdict will be based upon the evidence.” [Tr. p. 493.]

On the same page of the transcript the paragraph which appellant partially quotes in Assigned Error 33A, reads in full as follows:

“As each of the attorneys have told you, you are the exclusive judges of the fact. That means that so far as your decision upon the facts is concerned, *which is all that is going to be submitted to you to decide*, your judgment is final, and no one can inquire into it.” [Tr. p. 493; omitted portion emphasized.]

The Court again stated regarding its instruction taken from B. A. J. I. No. 28:

“Should you consider any of these questions, either in your own private reasoning, or in open discussion, you must look for an answer only to the evidence admitted in the trial of the action.” [Tr. p. 504.]

Referring to the amount of any verdict for plaintiff, the Court said:

“It means that your judgment may not be arbitrary or fanciful, but must have evidence behind it.” [Tr. p. 516.]

And in closing his charge to the jury the Court stated:

“You are to look only to the evidence in the case . . . You are not to be guided by the reasons for rulings on objections, but to consider the evidence, such evidence as did get in, and not speculate upon what evidence might have gotten in had there not been objections or other rulings of the court . . . You are not to be guided by any feeling of passion, prejudice, pity, or sympathy. Decide the case upon an intellectual basis, that is, an analysis of the evidence and the measuring of that evidence by the law which the court has given you.” [Tr. pp. 521-522.]

In this connection appellant criticizes the judge’s statements that the judgment of the jury on the facts “is final” and could not be “set aside;” but this is no more than appellant’s counsel told the jury in his argument when he said:

“It is up to them to give you enough evidence to make you fairly certain you are not making a serious mistake, *because any mistake you make cannot be corrected.*” [Tr. p. 438; emphasis added.]

(2) The instructions on negligence are said to show the Court’s determination to expand this issue “so that the jury could roam at will” over “every possible factual basis of liability within the four corners of the Jones Act.” (App. Op. Br. p. 176.) To sustain this extreme charge appellant is compelled to recognize three separate places in which the court did restrict the jury to the allegations of the complaint and to argue that because the court spoke of “the nature of negligence which was charged,” “the type of negligence that is alleged,” “the particular kind of negligence charged here,” it did not restrict the jury to the negligence alleged in

the complaint; and appellant is further compelled to argue that the use of the word "because" did not satisfactorily explain to the jury the doctrine of proximate cause. As to the latter point, the court had already expressly defined proximate cause. [Tr. p. 511.]

Far from expanding the issues of negligence, the trial court repeatedly restricted the jury to the precise kind of negligence charged in the complaint, even reading the appropriate allegations of the complaint to the jury for their guidance [Tr. pp. 506-507, 509, 518, 548, 559-560]; and it is surely accurate to refer to a failure to furnish sufficient safety appliances as a "kind" or "type" of negligence. The following portions of the charge, given expressly for the second cause of action, reveal the explicitness of the instructions on this point.

"The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to the cause of action which has been charged there, that is, you are not to go beyond the nature of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that." [Tr. p. 548.]

"All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was * * * directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." [Tr. p. 559.]

“Now, when he died if he did not die because of negligence she has no claim. If he did not die because of the particular kind of negligence charged here she has no claim upon this defendant. But if he did die because of the particular negligence, which has been charged here, then her right accrued the moment he died.” [Tr. p. 560.]

Moreover, even if there had been any undue generality in the instructions on negligence, appellant could not have been prejudiced. The record discloses clearly that, setting aside the question of failure to search, the only evidence of negligence presented to the jury or argued by counsel related directly to the insufficiency of safety appliances in and about the ventilator shaft. Under similar circumstances it was held in *Fleming v. Husted*, 164 F. 2d 675, that no error resulted from instructions more general than the evidence. There the complaint had charged that the defendant trustees had permitted a station platform to be in “a defective, dangerous, and uneven condition and allowed depressions to remain therein,” and the jury was instructed in that language regarding negligence. All of the evidence related specifically to the broken condition of the curb along the platform, and the defendants alleged error in refusing to limit the issue of negligence and proximate cause in express terms to that condition. The Court rejected this argument stating:

“Plaintiff’s attack and testimony were directed solely against the condition of the curb . . . On the basis of the trial proceedings and the record, we can see no room to doubt that the jury understood that, in adopting the expressions from the complaint, ‘platform,’ ‘uneven condition’ and ‘depressions,’ in the instructions, the court meant and was referring only to the condition of the curb.

“More apt and narrower terms could have been used, but it is not uncommon practice for instructions to state the issues of a case in the language of the pleadings unless some reason exists for not so doing.”

Fleming v. Husted, supra, at pp. 68-69.

(3) Appellant objects to the instructions given by the Court concerning the Certificates of Inspection issued by the U. S. Coast Guard for the Linfield Victory and to the refusal to give appellant's proposed instructions on that subject. The court instructed on this matter by first giving the standard instructions on expert witnesses in B. A. J. I. Nos. 33 and 33a. [Tr. pp. 504-505.] It then referred specifically to the Certificates of Inspection and advised the jury correctly that such Certificates were to be considered as evidence, to be weighed with all the other evidence, [Tr. p. 505], but that they could not “suffice” for the duty of the jury; that the duty of judging the issue rested on the jury, which must give its judgment “independently” of the witnesses; that the “opinions of witnesses” were “not a substitute for the jury.” [Tr. pp. 504-506.]

Appellant singles out the words “suffice” and “independently” and attacks them on the ground that they would lead the jury to disregard the evidence in determining this issue, and amounted to an instruction that the Certificate of Inspection was not sufficient to support a finding that the ventilator shaft was reasonably safe; but the criticized language must be considered in context. The instruction as a whole accurately told the jury that the Inspection Certificates were evidence of due care but were not more; that the jury was not bound by them,

nor by any other expert opinion, but must exercise their judgment on the basis of all the evidence. This correctly states the law. (See *supra*, section B of this brief.)

The court properly rejected appellant's instructions 58a and 60 [Tr. pp. 73-74] on this subject, which could only have misled the jury. Both instructions assert as presumptions of law that the Coast Guard had examined the Linfield Victory, had issued a certificate of inspection, and had satisfied itself that the vessel was seaworthy and did not have on board any equipment, apparatus, or appliances not conforming to the requirements of law; and charge that, unless these presumptions were controverted by other evidence, the jury was bound to find according to such presumption. There was no basis for any presumption concerning the acts of the Coast Guard, because appellant had introduced into evidence the certificate of inspection for the period here relevant and had introduced the testimony of Captain Dyer as to the meaning of the certificate. Appellant's instructions told the jury something quite different and completely improper—that the inspection certificate raised a presumption that appellant had furnished sufficient appliances, in accordance with which the jury would have to find unless controverted. Appellant cannot complain of a refusal to give inaccurate or misleading instructions. (*American Surety Co. v. Blount County Bank*, 30 F. 2d 882, 884.)

(4) The Court instructed that a party seeking to deny a rebuttable presumption must present contrary evidence. [Tr. p. 501.] Appellant assigns error in the failure to instruct, as in appellant's instruction No. 51 [Tr. pp. 66-67], that appellant might rely on evidence presented

by appellee in rebutting a presumption and need not present affirmative evidence. Again, appellant is not in a position to complain of error on this point, because its offered instruction was an inaccurate and misleading formula instruction. After stating generally the law on evidence rebutting presumptions, appellant's No. 51 states:

“Thus, if the evidence *produced by the plaintiff* fails to prove negligence on the part of defendant by a preponderance thereof or fails to prove by a preponderance that Nathanael Patrick Hutchison suffered injury or death as a proximate result of such, if any, negligence, your verdict would have to be in favor of the defendant, *even if the defendant has produced no evidence* whatever upon the subjects of alleged negligence on its part or proximate cause.” [Tr. pp. 66-67; emphasis added.]

The instruction as a whole graphically illustrates the reason for the rejection of appellant's proposed instructions *in toto*. The quoted portion has nothing to do with presumptions. Moreover, appellant had produced evidence indicating its own negligence. [*E.g.*, Webb's testimony on the need for artificial illumination when working in the masthouse. Tr. pp. 251, 252.] The jury could only have concluded from the whole instruction that appellee was required to prove her case solely from her own evidence, whereas appellant could rely on its own and appellee's evidence!

(5) The charge that the instructions on negligence and contributory negligence were one-sided has been substantially answered in appellee's discussion of points 2 and 4 under this heading. Appellant argues that the Court instructed the jury with particularity on appellant's duty of care and refused to so instruct regarding Hutchi-

son's duty of care, but the record shows that in addition to the general instructions on negligence, contributory negligence, and proximate cause [Tr. pp. 510-512], the court instructed the jury specifically and in detail of what might constitute contributory negligence by Hutchison and what its effect would be. [Tr. pp. 512-513.] Appellant cannot complain of the refusal of its requested instruction No. 47, [assigned error 34 qq; Tr. pp. 64-65.] That instruction, as appellee has already pointed out, distorts the doctrine of contributory negligence in such a manner as to conceal from the jury the applicability of the doctrine of comparative negligence.

The instruction given by the court was correct as a statement of the burden of proof. (*Reynolds v. Roll*, 122 Cal. App. 2d 826, 838-839, 266 P. 2d 222, 230.) In *Blanton v. Curry*, 20 Cal. App. 2d 793, 129 P. 2d 1, cited by appellant, (in which no proper instruction on the subject was offered by the appellant), the Court observed that a similar instruction was a correct statement of the law, that it did no more than inform the jury on the question of burden of proof, and that "[a]lthough incomplete in form, no harm could have resulted from the giving of the criticized instruction." (*Blanton v. Curry*, *supra*, at p. 805 of 20 Cal. App. 2d, and 8 of 266 P. 2d). It is also patent that the jury was instructed to and did weigh all evidence on the issue of Hutchison's due care, the only issue on which there was a presumption benefiting appellee. In his argument to the jury counsel for appellant relied on appellee's evidence to show Hutchison's contributory negligence. [Tr. pp. 409-410, 437, 441-442.] The Court, in its instructions on contributory negligence, specifically discussed the question whether Hutchison might have felt rugged or had a hang-over

and instructed that if the jury so believed they could find him contributorily negligent. [Tr. p. 513.] All of that evidence, of course, was from appellee's witnesses. The court further instructed that if there was some other fact that might be felt "upon a full analysis by a jury" to show contributory negligence, they should reduce any recovery accordingly. And the answers of the jurors to the interrogatories revealed that the jury had considered the issue of contributory negligence and had found Hutchison to be contributorily negligent, demonstrating that appellant had carried its burden of proof on that point.

(6) The instruction given by the Court on an employee's right to assume the exercise of reasonable care to furnish a reasonably safe place within which to work, in the absence of notice to the contrary, [assigned error 33e; Tr. p. 508], whether applicable or not, could not have prejudiced appellant, since the court instructed the jury on contributory negligence and its effect. The very cases cited by appellant on this point hold its objection untenable. In *Thompson v. Camp*, 163 F. 2d 396, the Court declared that even if an instruction that plaintiff was entitled to presume the exercise of due care by his employer was inapplicable, no prejudice resulted because

"The District Judge also gave an instruction on contributory negligence . . . which necessarily gave effect to any knowledge that Camp may have had about the condition of the premises." *Thompson v. Camp*, *supra*, p. 402.

The vice in appellant's instruction No. 47 we have just discussed.

(7) Appellant alleges a failure to instruct as to the issues raised by the pleadings and asserts that the Court should not have read the complaint. The Court may in its discretion read the pleadings to the jury. (*Illinois Cent. R. Co. v. Sigler*, 122 F. 2d 279, 286; *Norfolk & W. Ry. Co. v. Trautwein*, 111 F. 2d 923, 925; *Earl v. San Francisco Bridge Co.*, 31 Cal. App. 339, 349, 160 Pac. 570, 574.) The Court instructed the jury that the allegations of the complaint must be proved by evidence and that plaintiff had the burden of proof as to whether decedent was in the course of his employment, whether the defendant was negligent and whether its negligence was the proximate cause of the decedent's death. [Tr. pp. 499, 510, 555, 559-560.]

Appellant tortures isolated portions of the charge to allege that the jury must have concluded, from the instructions that appellee had "a cause of action," that the court was telling them that appellee had a right to recover from appellant. We are constrained to label this assertion an affront to the intelligence of the jury. The charge of the Court plainly told the jury that they must find for the plaintiff only if she had carried her burden of proof as to the essential issues. The same must be said of appellant's argument that the jury was told it was a "fact" that appellee lost the support of her husband due to the negligence of the defendant. [Tr. p. 560.] The criticized sentence is preceded by a full explanation of the basis of plaintiff's action, which includes the following:

"All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was
* * * directly caused by reason of the negligence

of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.’” [Tr. p. 559.]

(8) Appellant’s contentions that the trial court told the jury “that in the mere event of injury Hutchison was entitled to” his rights under the Jones Act and that “if the jury decided ‘the second cause of action,’ it was to ‘decide it in her favor for the damages which she had suffered’” (App. Op. Br. p. 183), are equally insubstantial. The quoted remark as to the second cause of action was made by the court in distinguishing Mrs. Hutchison’s status as a claimant under the second clause from her status under the first cause, and a part of the same charge with respect to the second cause reads as follows:

“Liability, if it exists, [referring to the second cause of action] depends on the same facts respecting negligence, if it existed, contributory negligence, if it existed, and the need for proximate cause, and so forth, as the first cause of action.” [Tr. p. 518.]

The comments of the Trial Court that the deceased was a contributor to appellee’s support complained of by appellant [Tr. pp. 518-519] were not made argumentatively nor in such manner as to arouse passion or sympathy, but were made as a matter of undisputed fact to distinguish the second cause of action from the first.

(9) The jury returned to the Court for further instructions after several hours of deliberation and disclosed by the questions and comments of the foreman that they, or some of them, felt entitled to consider the issue of negligent failure to search as an item of negli-

gence with respect to the second cause of action. There is no evidence whatsoever in the record that the jury was, as appellant asserts, in a “rebellious and sympathetic state of mind.” (App. Op. Br. p. 100.) Appellant asserts that in answer to the jury’s request for a re-statement of the instructions regarding the applicability of failure to search to the second cause of action, the Court assumed in its instructions as an established fact that Hutchison was injured by appellant’s negligent failure to provide a reasonably safe place to work. Appellant’s brief at this point (pp. 184-185) places several phrases in quotation marks, but nowhere is there a reference to the transcript of record or to an assignment of error. Appellee has read carefully the entire charge to the jury when they returned for instructions, and cannot perceive any point in that charge in which the court assumed a negligent failure to search.

The instruction that there was only one law suit in which appellee could collect and that the jury would have to determine the natural expectancies and what sum could be awarded at that time [assigned error 33ee; Tr. p. 559], is surely a correct statement of the law. Appellant asserts prejudice, citing *Virginian Railway Co. v. Armentrout*, 166 F. 2d 400. A reading of that case will indicate the gulf between it and the instant action. There a 13-month old infant lost all or part of both arms in a railroad accident, and a reading discloses that the Appellate Court was dealing with an inflamed jury whose verdict the court considered grossly excessive. In this

case, the charge of the trial judge was fair and impartial, and no prejudicial error could have resulted to defendant from the portion criticized. Appellant's counsel told the jury himself that they had only one chance to decide this case, when he said in speaking of liability that "you want to be satisfied that your verdict is just, if you bring in one against the defendant," and "it is up to them to give you enough evidence to make you thoroughly certain you are not making a serious mistake, because any mistake you make cannot be corrected." [Tr. p. 438.]

(10) The Court gave an instruction from B. A. J. I. (No. 303-A) that the prudence required of appellant in the exercise of ordinary care increases or decreases "as do the dangers that reasonably should be apprehended." Appellant argues that the instruction does not intelligibly cover the doctrine of foreseeability. The instruction embodies the doctrine of the cases, *Ericksen v. So. Pac. Co.*, 39 Cal. App. 2d 374, 246 P. 2d 642, cert. den. 344 U. S. 897, 73 S. Ct. 277, 97 L. Ed. 693; *Truitt v. So. Pac. Co.*, 112 Cal. App. 2d 218, 245 P. 2d 1083; and none of appellant's cited cases contains either a holding or a dictum that the instruction is improper. *Sundberg v. Washington F. & O. Co.*, 138 F. 2d 801, in fact, states substantially the same doctrine at p. 803:

"Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowner or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew."

The instructions to the jury fully and thoroughly covered the essential issues in this action and the applicable law, and any departures from strict legal phraseology were well within reasonable tolerance. As said in *Gray v. Dieckmann*, 109 F. 2d 382, 388:

“A judge in instructing a jury at *nisi prius* cannot be held up to the exactitude of legal expression. He must apply his instructions to a jury with a broad brush. If his instructions are substantially correct and contain no misleading errors, it is sufficient.”

Conclusion.

Appellee respectfully submits that the judgment is amply supported by the evidence and that there were no errors occurring during the course of this trial which would require its reversal, and prays that the judgment be affirmed.

Respectfully submitted,

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By RAYMOND C. SIMPSON,

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Attorneys for Appellee.

No. 15,091

United States Court of Appeals
For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a
corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison,
deceased,

Appellee.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

It is impossible, in twenty pages, to distinguish inapplicable cases cited or to fairly and adequately discuss the inaccuracies and misrepresentations of the testimony and evidence contained in the appellee's brief. Appellant's statement of the case (O.B., pp. 6-45) is *accurate* and uses the language of the witnesses, gives *accurate* descriptions of the photographs and sets forth the *exact* language of the documentary evidence. Appellant's *contentions* are as *it* states them. Therefore, the Court is requested to rely solely upon the record in ascertaining the facts and to ascertain the contentions of appellant from *its* statement thereof.

I.

THE CASE OF CORTES v. BALTIMORE INSULAR LINE, 287 U.S. 367, DOES NOT SUPPORT THE APPELLEE'S CONTENTIONS WITH RESPECT TO PARAGRAPH IX OF THE COMPLAINT.

“We are to determine whether death resulting from the negligent omission to furnish care or cure is death from *personal injury* within the meaning of the statute.” (287 U.S. 367, 372, 77 L. ed. 368, 371.)

There are no averments in the amended complaint in the instant cause that the master of the S. S. “Linfield Victory” had the slightest knowledge, *before* Hutchison died, that he had suffered any personal injury whatever, or that he negligently failed to provide medical or surgical care or that as a proximate result thereof Hutchison died. To the contrary, the “second cause of action” avers that “as a result of *said* injuries” [those referred to in paragraph VIII] (T.R., pp. 6-7) he died.

In the *Cortes* case no question of law, disputed or otherwise was raised or discussed or even mentioned in the opinion in respect of the proposition that the aggravation of an existing illness is not a personal injury suffered *in the course of the employment*. It is true that “the act for the protection of railroad employees does not define *negligence*”; (287 U.S. 367, 377, 77 L. ed. 368, 374) but it *does* state that *the* negligence for which there is liability is that “of any of the officers, agents or employees of *such* carrier” (Title 45 U.S.C. § 51); and it also states that *the* surviving widow for whose benefit the right of action is *conferred* is “the surviving widow . . . of *such* employee.” (Title 45 U.S.C. § 51.) “*Such* employee” is “any person suffering injury while he is employed” (by

a *common carrier* engaged in interstate or foreign commerce) “in *such* commerce.” (id.) The Supreme Court did not discuss any of these propositions in the *Cortes* opinion. It is, therefore, not authoritative precedent in respect thereof. (*Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136; 73 L. ed. 220, 223; 13 Cal. Jur. 2d pp. 662-663, § 129.)

II.

THE “SECOND CAUSE OF ACTION” DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION OR AVERMENTS SHOWING THAT THE PLEADER IS ENTITLED TO RELIEF.

Appellant contends: No statute creating a right of action for damages by reason of death is *valid* unless it *specifies who* is liable, the *person or persons* for *whose* benefit the action may be maintained and the *grounds of liability*. The *language* of the Jones Act contains *none* of those essentials. (Title 46 U.S.C. § 688.) It does *incorporate*, in their *entirety*, “all statutes of the United States *conferring or regulating the right of action* for death in the case of *railway employees . . .*”

The appellee contends in her reply brief that the Congress intended to differentiate and discriminate between the surviving widow of a deceased railway employee and that of a deceased seaman, in that the seaman’s widow is *not* required to aver or prove what the incorporated statute requires of the widow of the deceased railway employee.

Appellant prints the statutes as follows:*

“Any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law, with the right of trial by jury, and in *such* action *all* statutes of the United States *modifying or extending the common-law* right or remedy in cases of *personal injury* to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in *such* action *all* statutes of the United States *conferring or regulating the right of action for death* in the case of *railway* employees *shall* be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.” (Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007; Title 46, U.S.C. § 688.)

“Every *common carrier* [by railroad] while *engaging* in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to *any* person suffering injury *while he is* employed by *such* carrier in *such* commerce, or, in case of the death of *such* employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of *such*

*The words of the F.E.L.A. which cannot be applicable to an action for damages by reason of the death of a seaman not employed by a common carrier *by railroad* are placed within brackets. All emphasis is added throughout.

employee; and, if none, then of *such* employee's parents; and, if none, then of the next of kin dependent upon *such* employee, for *such* injury or *death* resulting in whole or in part from the negligence of any of the officers, agents or employees of *such* carrier, or by reason of any defect or insufficiency, due to *its* negligence, in *its* [cars, engines,] appliances, machinery, [track, roadbed,] works, boats, wharves, or other equipment.

“*Any* employee of a *carrier*, any part of whose duties as *such* employee shall be the furtherance of *interstate or foreign commerce*; or shall, in any way *directly or closely and substantially*, affect *such* commerce as above set forth shall, for the purposes of this chapter, be considered as *being* employed by *such* carrier in *such* commerce and shall be considered as entitled to the benefits of this chapter.” (Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; Title 45, U.S.C. § 51.)

“In all actions hereafter brought against any *such common carrier* [by railroad] under or by virtue of any of the provisions of *this* chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no *such* employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such *common carrier* of any *statute* enacted for the safety of employees contributed to the injury or death of *such* employee.” (Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; Title 45, U.S.C. § 53.)

“The term ‘common carrier’ as used in this chapter shall *include* the receiver or receivers or *other persons or corporations* charged with the duty of the *management and operation* of the *business* of a *common carrier*.” (Apr. 22, 1908, c. 149, § 7, 35 Stat. 66; Title 45, U.S.C. § 57.)

“Any *right of action* given by *this chapter* to a *person suffering injury* shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of *such* employee, and, if none, then of *such* employee’s parents; and, if none, then of the next of kin dependent upon *such* employee, but in such cases there shall be only one recovery for the same injury.” (Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291; Title 45, U.S.C. § 59.)

In the “Statement of the managers on the part of The House”, 66th Congress, 2d Session, House of Representatives, Report No. 1093, June 2, 1920 (*three* days before the Jones Act was enacted as part of The Merchant Marine Act of 1920), at page 35, the following appears: “Amendment No. 139. This amendment amends section 20 of the seamen’s act so as to *extend* the *Federal Employers’ Liability Act* to cases of personal injury to or *death of seamen*. . . .”

The appellant contends that it has an *absolute* right, pursuant to Article I, sections 1 and 8, clause 3, Article VI, clause 2, Amendment V and Amendment X, Constitution of the United States, to have its rights, liability and defenses determined in accordance with the plain and unambiguous language deliberately chosen and used by the Congress in enacting the foregoing statutes; that the

unjustified deletion or ignoring of any word or other part thereof would be in direct contravention of said right; and also in contravention of the guarantee of “due process of law” as set forth in Amendment V. These Constitutional provisions read as follows:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” (Art. I, Sec. 1.)

“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;” (Art. I, Sec. 8, cl. 3.)

“This Constitution and the *Laws of the United States* which shall be *made* in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; . . .” (Art. VI, cl. 2.)

“No person shall be . . . deprived of property, without due process of law; . . .” (Amendment V.)

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (Amendment X.)

If this Court is of the opinion that any of the language actually used by the Congress in chapter 2 of the Federal Employers’ Liability Act and which is literally applicable to an action for damages by reason of the death of a seaman is *not* controlling, appellant respectfully insists that its *constitutional* rights require and entitle it to a *forth-right and direct* decision *quoting* the parts which are to be deleted by judicial construction. This task will not be

simple, and it cannot be accomplished by a *nebulous* observation, which decides and declares *nothing* specific, that “the Federal Employers’ Liability Act does not furnish a rigid pattern for all rights of a seaman’s widow.” The disputed question of law is this: What, if any, *specific* parts of said F.E.L.A. do *not* apply? Appellant contends that the *only* words in the F.E.L.A. which may be deleted are the following: “by railroad”; “cars, engines”; and “track, roadbed”; and that *all* of the remaining language constitutes the sole and exclusive basis of the *right of action* referred to in the Jones Act. In all other respects the applicable rules are as follows:

“It is fundamental that the province of *construction* of statutes lies *wholly* within the domain of *ambiguity*. The rules of construction are an aid to resolve doubts and not to create them.” (*Santa Monica, etc. v. U.S.*, 99 F. 2d 450, 455.)

“The courts must confine themselves to the construction of the law as it is, and not attempt to *amend* or *change* the law under the guise of construction. (82 C.J.S. pp. 530-532, § 312.)

“* * * our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to *add* to nor to *subtract*, neither to *delete* nor to *distort*.” (62 *Cases of Jam v. U.S.*, 340 U.S. 593, 596, 95 L. ed. 566, 570.)

“There is a presumption that every word, sentence or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used. Conversely, it will not be presumed that the legislature inserted idle or mean-

ingless verbiage, or superfluous language, or intended any part or provision to be meaningless, redundant or useless.” (82 C.J.S., pp. 551-552, § 316.)

“Where the *language* of a statute is *plain and unambiguous*, there is no occasion for *construction*, . . . An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or confined in operation within narrower limits or bounds than manifestly intended by the legislature, because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, otherwise the court would be assuming legislative authority. In construing a statute expressed in reasonably clear language the court should neither read in nor read out; and where a law is plain, unambiguous, and explicit in its terms, the exceptions are few indeed that authorize a court to read something into it that the law writers did not themselves put therein.” (82 C.J.S. pp. 577, 582, 583, 587, 588, § 322.)

It is *indispensable* that a complaint must state *facts* which show a cause of action under the statute involved in order to invoke the benefit thereof. (82 C.J.S. 1021, § 443; and cases cited in appellant’s opening brief, pp. 3-5.)

The appellee has argued her contentions upon the fallacy that the Federal Employers’ Liability Act is *not* a part of the Jones Act. The language used by the Congress is unambiguous. In respect of a *deceased* seaman, the personal representative has two possible rights of action, pursuant to Title 45 U.S.C. §§ 51, 59, incorporated by reference thereto in the Jones Act.

(1) The *survival* of the living seaman's right to recover damage by reason of conscious pain and suffering can be found nowhere excepting in section 59. The *statute* states in unambiguous language that "any *right of action* given by *this* chapter to a person suffering personal injury shall survive to his or her personal representative." The *only* right of action *given* by chapter 2 of the F.E.L.A. to "a person suffering personal injury" is that *created* against common carriers [by railroad] while engaging in interstate or foreign commerce; and such right is "given" only "to any person suffering injury *while* he is employed by *such* carrier in *such* commerce" in the event *such* injury is one "resulting in whole or in part from the negligence of any of the officers, agents, or employees of *such* carrier, or by reason of any defect or insufficiency due to *its* (such carrier's) negligence, in *its* (such carrier's) cars, engines, *appliances*, *machinery*, track, roadbed, *works*, *boats*, *wharves*, or *other equipment*." (Title 45, U.S.C. § 51.) The last paragraph of this section is a statutory definition of what is included within and meant by the phrase "employed by such carrier in such commerce."

(2) The statutory right of action in respect of a seaman who dies as a result of personal injury suffered in the course of his employment is *not* a survival of *any* right or remedy which might have been available to a living seaman pursuant to any statute or the unseaworthiness doctrine of liability regardless of negligence. The "*rights and remedies* are those possessed by *railway employees and their personal representatives* under the laws of the United States. (*Panama R.R. v. Johnson*, 264 U.S.

375, 44 S. Ct. 391, 68 L. ed. 748.) As this action was brought by the personal representative to recover damage for the death of the seaman, the rights of the parties depend upon the statute." (*Kunchman v. U.S.*, 54 F. 2d 987, 989.) The "second cause of action" (T.R., pp. 7-8) does not involve *any* right of action given to a *seaman*, as such, or otherwise. It is not for his benefit. It is for the benefit of the surviving widow" etc. (Title 45, U.S.C. §51; *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 346-347, 81 L. ed. 685, 688.) The *statute* provides the right of action "for the benefit of the surviving widow . . . of *such* employee." All we have to do is to read the preceding provisions of the statute to ascertain *who* is referred to as the antecedent of the plain words "*such* employee". The first place we find the same words is in the phrase "in case of the *death* of *such* employee". Going back a little further we find the antecedent of the words "*such* employee". It is "*any* person suffering injury *while* he is employed by *such* carrier in *such* commerce." The antecedent of the phrase "by *such* carrier in *such* commerce" is the language "Every *common carrier* by railroad *while engaging in*" interstate or foreign commerce. The foregoing analysis is on obviously sound ground and specifies the status and relationship of the parties upon whom liability is imposed and those for whose benefit the statutory right of action is conferred.

We now proceed to a consideration of the sole *factual* bases of negligence as provided for by the Congress. There is liability in damages "for death resulting in whole or in part from the negligence of any of the officers, agents, or employees of *such* carrier, or by reason of any

defect or insufficiency, due to *its* (such carrier's) negligence, in *its* (such carrier's) cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Thus the "common-carrier-engaging in interstate or foreign commerce" requisite is carried by direct and plain language into the factual bases of liability in respect of negligence.

It is an obvious certainty that the *language* of the Jones Act, all by itself, does not create a cause of action for damages by reason of the death of any seaman. It needs the statutes of the United States "conferring or regulating the right of action for death in the case of railway employees" and plainly states that *all* such statutes "*shall* be applicable." (Title 46, U.S.C. § 688.)

There is not a single ambiguity of any kind or character in any of the sections of chapter 2, F.E.L.A. (§§ 51-59.) Therefore, the intention of the Congress is to be ascertained from the language it chose to deliberately express its intent. The Congress knew when it enacted the Jones Act that the constitutionality of the F.E.L.A. had been sustained upon the *sole* ground that it was within its legislative power to regulate interstate and foreign commerce. (*Mondou v. N.Y., N.H. & H. R. Co.*, 223 U.S. 1, pp. 46-49, 56 L. ed. 327, pp. 344-350.)

In *Lindgren v. U. S.*, 281 U.S. 38, 74 L. ed. 686, the Court held that the "wrongful death" statute of Virginia was not applicable to the death of a seaman within the territorial waters of said state because the Congress, in the exercise of its power to regulate interstate commerce, by *incorporating* the *Federal Employers' Liability Act*

in the Jones Act, had occupied a field which was thereby *withdrawn* from the legislative power of the state.

The Court said: “*The Federal Employers’ Liability Act*, which was *incorporated* in the Merchant Marine Act by reference, related to the liability of *common carriers* by railroad to their employees *in interstate and other commerce, as specified.*” (281 U.S. 38, 40; 74 L. ed. 686, 689.) “By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages *in accordance with the provisions of the Federal Employers’ Liability Act.*” (281 U.S. 38, 44; 74 L. ed. 686, 691.) “These decisions are in accordance with the long-settled rule that since Congress by the Federal Employers’ Liability Act took possession of the *field* of the employers’ liability to employees *in interstate transportation* by rail, all state laws on the subject are superseded. . . . In the light of the *foregoing* decisions and in *accordance* with the principles *therein* announced we conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and *incorporating in that law the provisions of the Federal Employers’ Liability Act—establishes* as a modification of the prior maritime law *a rule of general application* in reference to the *liability of the owners of vessels* for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the states and *is as comprehensive of those instances in which by reference to the Federal Employers’ Liability Act it excludes liability, as of those (instances) in which liability is imposed; and that, as it covers the entire*

field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject matter.” (281 U.S. 38, 45, 46, 47; 74 L. ed. 686, 692, 693.)

Thus, there can be no escape from the basic proposition that the Federal Employers’ Liability Act is the life and vitality of the Jones Act; and that the “second cause of action” is fatally defective. (This is *not* a recent contention of appellant. It was fully and fairly exposed and raised in appellant’s written motion to dismiss the amended complaint *before* it filed its answer thereto; as this Court may see from looking at said motion which is a part of the trial court file now in the file of this Court, although not printed in the Transcript of Record.)

III.

THERE IS NO DIRECT OR INDIRECT EVIDENCE IN THE RECORD WHICH IS SUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT ON THE “SECOND CAUSE OF ACTION”.

No jury can draw inferences excepting those reasonably deducible from direct or indirect *evidence*.

The appellee does not, in her reply brief, point to *any* evidence from which the jury *could* infer that (1) Hutchison was not fully cognizant of the ventilator shaft, the pipe railings surrounding it and the access shaft in which the ladder was located; or (2) that the degree of visibility *actually* present within masthouse number 2 on *April 24, 1951*, was insufficient to enable Hutchison to clearly see everything therein. She declines to discuss or write *any-*

thing on those vital subjects. (*Foster v. Moore-McCormack Lines, Inc.*, 131 F. 2d 996; *Lahde v. Soc. Armadora Del Norte*, 220 F. 2d 357 [please see the *actual* allegations of the amended libel in rem, pp. 30-35, T.R. No. 14155]; *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784; *Read v. U.S.*, 201 F. 2d 758; and *The Wearpool*, 112 F. 2d 245.) Appellee has cited *no* decision where any judgment has been affirmed in any case where a seaman *or* longshoreman has fallen or gotten into a hatch or shaft surrounded by either a rope, chain or pipe railings; or even into an *open* hatch or shaft when he *knew* it was there and no *evidence* of insufficient visibility at the precise time of the fall appeared in the record.

Appellee tries to rescue or vitalize Amundsen's and Crawford's testimony as to screens, etc., by pointing to the photographs (A.B., pp. 20-21.) Amundsen *testified* that he had never seen any other ventilator shaft without a ladder going down it, (T.R., p. 143) thereby demonstrating that he had never been on any Victory ship other than the "Linfield Victory". Crawford had been on only *five* of the *several hundred* Victory ships built during the war and had not even been in the masthouses of each one of those five. (T.R., pp. 235-236.)

CONCLUSION.

There are other matters referred to in Appellee's Brief which appellant can answer but the 20 page limit will not permit it to do so. It is respectfully requested that appellant be given a reasonably sufficient extra time allowance at the forthcoming oral argument to do so.

Dated, San Francisco, California,

December 5, 1956.

Respectfully submitted,

LASHER B. GALLAGHER,

Attorney for Appellant.

No. 15,091

United States Court of Appeals
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EXCERPTS FROM APPELLANT'S ORAL ARGUMENT,
AND ADDITIONAL AUTHORITIES.

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FILED

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PAUL P. O'BRIEN, CL

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EXCERPTS FROM APPELLANT'S ORAL ARGUMENT, AND ADDITIONAL AUTHORITIES.

The verbatim reporter's transcript of the opening and closing oral arguments of appellant is part of the record in the custody of the Clerk. To obviate any waste of the Court's time, verbatim excerpts therefrom are set forth hereinafter, with appropriate reference to the page thereof. All definitions of words (in Article III, § 2, Constitution), in respect of their common meanings as of the *time* of their use (the *framing and ratification* of the Constitution), are quoted from the Oxford Dictionary, Unabridged. These are in italics, enclosed within brackets, following each such word. All other emphasis throughout is added.

1. “. . . the first point to which I desire to direct your Honors’ attention is the question of jurisdiction in the trial court. That question has two facets to it which, as I understand the law, must be satisfied. This action was filed on the law side of the court. Therefore the court was required of its own motion to investigate the questions, whether it was vested with jurisdiction of the *parties*, and jurisdiction of the *subject matter*.” (Tr. p. 2.)

Authorities: “WE THE PEOPLE of the United States, . . . do ordain and establish this CONSTITUTION for the United States of America.” (Preamble.) “All *legislative* Powers *herein* granted *shall* be vested in a *Congress* of the United States . . .” (Art. I, § 1.) “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . . To *constitute* Tribunals *inferior* to the supreme Court. . . . To make all laws which shall be *necessary and proper* for *carrying* into *Execution* the *foregoing* Powers, and all other Powers *vested* by this *Constitution* in the Government of the United States, or in any Department or Officer thereof.” (Art. I, § 8.) “The *judicial* Power of the United States, *shall be vested* in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish*.” (Thus *all* judicial power of the United States, other than that *vested* by the Constitution “in one supreme Court”, is by the same document *vested* (and *not* within the power of the Congress to *extend, diminish, modify* or *alter*) “in such *inferior Courts*” as it *does* ordain and establish. Its *sole* power, in respect of this judicial *Power*, is to *distribute* or *allocate* it.) (Art. III, §§ 1, 8) “The judicial Power shall extend [*To cover an area; to stretch out in various directions; to widen the range, scope, area of application of (a law, operation, dominion, state of things.)*] to all [*The entire or unabated amount or quantity of; the*

whole] Cases, [*The state of facts judicially considered; a cause or suit brought into court for decision*] in Law and Equity, arising [*springing up, origination*] under [*by or included in another; in accordance with*] this Constitution, the Laws of the United States, . . .;—to all Cases of admiralty [*That branch of the administration of justice which deals with maritime questions and offenses.*] and maritime [*Connected with the sea in relation to navigation, commerce, etc.; relating to or dealing with matters of commerce or navigation on the sea*] Jurisdiction [*Administration of justice; exercise of judicial authority, or the functions of a judge or legal tribunal; legal authority or power*];—. . . to Controversies . . . between citizens of different States; . . .” (Art. III, § 2.)

“This Constitution, and the *Laws* of the United States which shall be *made in Pursuance* thereof [*not the opinions of any court*]; and all Treaties made, or which shall be made, under the Authority of the United States, *shall* be the *supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Art. VI, second paragraph.) But, “The powers [*all powers of sovereignty, vested originally in* “The People of the United States of America”, including *absolute and all inclusive* political, executive, legislative and judicial powers in respect of the territorial and aquatic domains of every free and independent state or political entity] *not delegated* to the United States *by* the Constitution, nor *prohibited* by it to the States, are *reserved* to the States respectively, or to the people.” (Amendment X.)

As to the fundamental and established rules governing “Constitutional Law” and the limit of the doctrine “*Stare Decisis*” in this field, please see: 11 American Jurisprudence, pp. 661-663; 667; 676-679; 680-682; 14 Ameri-

can Jurisprudence, p. 345; *Smith v. Allwright*, 321 U.S. 649, 664-666, 88 L.Ed. 987, 998.

As to the distinctions between, and limitations of, the *legislative* power of the Congress (its restriction to the regulation of interstate and foreign Commerce) and the *judicial* power vested in various federal courts, please see: *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard, 443, 452-457, 13 L.Ed., 1058, 1062-1064; and *The Lottawanna*, 88 U.S. 640, 574-578, 22 L.Ed. 654, 662-663.

2. “. . . there is no averment of diversity of citizenship in the original Complaint which was filed on October 13, 1951, and there is no averment of diversity of citizenship in the amended Complaint upon which the action went to trial.” (Tr. p. 2.) “. . . I contend, No. 1, in order to vest jurisdiction of the persons in the United States District Court, the Complaint must contain clear, concise, and direct averments in respect of the citizenship of both of the parties, and unless that averment is in the complaint, the District Court of the United States has no jurisdiction whatever in respect of the parties in any case where jurisdiction depends at all upon that particular proposition, to wit, diversity of citizenship.” (Tr. p. 3.)

Authority: Article III, § 2, *supra*.

3. “The next point in respect of jurisdiction is this: . . . the last sentence of that part of the Jones Act which is contained within the four corners of Section 33 of the Merchant Marine Act of 1920 reads as follows:

‘*Jurisdiction* in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.’ ”

“Jurisdiction” in this sentence was held, by the Supreme Court, to mean “Venue”. Authority: *Panama R.*

Co. v. Johnson, 264 U.S. 375, 384-385, 69 L. Ed. 748, 751-752. Comment: The Court said: “The case *arose* under a law of the United States and involved the requisite amount, if any was requisite;” (264 U.S. p. 383, 68 L.Ed. p. 751) but does not indicate that this was a *disputed* question of law submitted for *decision*. Cf. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136, 73 L.Ed. 220, 223.

4. “Now, the next sources of possible jurisdiction in the court below are found in the Statutes of the United States enacted by the Congress which follow the provisions of Article III, Section 2 of the Constitution of the United States.” (Tr. p. 4.)

“Title 46 U. S. Code 1331:

‘The district courts shall have original jurisdiction of all *civil actions* wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution, Laws or Treaties of the United States.’

“... the original [and amended] complaint[s] contain this allegation in Paragraph I:

‘This action is maintained under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as “The Jones Act” and all statutes amendatory and supplemental thereto.’

“There is no averment in the Complaint that this statute is a subject of construction by the court. In other words, there isn’t any averment in this Complaint anywhere which satisfies the basic requirements of jurisdiction of the subject matter in the event it is sought to predicate that jurisdiction upon that particular section of the Judicial Code or upon the same language in the Constitution. And I will call the attention of your Honors to a few excerpts from cases.” (Tr. p. 5.)

Authorities: *Little York etc. Co. v. Keyes*, 96 U.S. 199, 201-203, 24 L.Ed. 656, 658; *Shultis v. McDougall*, 225 U.S. 561, 569, 56 L.Ed. 1205, 1211; *Gully v. First National Bank*, 299 U.S. 109, 112-114, 81 L.Ed. 70, 72-73; *Bell v. Hood*, 327 U.S. 678, 685, 90 L.Ed. 939, 944.

“When we consider the question from a wider aspect, we think all of the analogies point to the conclusion that federal jurisdiction does not exist in the case before us. It is not just because a right has its *origin* in federal law that a federal court has jurisdiction over matters which grow from that right . . .

“There are many Supreme Court decisions which in a variety of situations point out that the jurisdiction of federal courts is not to be extended by implication from the fact that some right involved originated under United States law.”

Republic Pictures Corp. v. Security-First Nat. Bank,
197 F.2d 767, 769-770.

In *Van Camp Sea Food Co. v. Nordyke*, 140 F.2d 902, where the appellants' answer “*denied* that the plaintiff had any right to maintain the action under the provisions of the Jones Act” (140 F.2d at p. 904), this Court, evidently being of the opinion that there *was* a *controversy* in respect of the applicability of said “Law of the United States”, held that diversity of citizenship was not essential to the jurisdiction of the District Court.

“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between: (1) Citizens of different States . . .” (Title 28, U.S.C. § 1332.) [In cases where this section is applicable, either party may withdraw the same from the jurisdiction of state courts.]

5. “Now, the next possible source of jurisdiction is § 1333, Title 28, U.S.C.: ‘The district courts shall have

original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.'

"Now, my contention in respect of that section is simply this: The plaintiff did not place any averments in her complaint pursuant to which she would show any dispute in respect of that statute or any necessity for any decision in respect of that statute. Therefore, the case does not involve a case arising under a law of the United States. . . . I contend that cases of *admiralty and maritime jurisdiction* as referred to in the Constitution are entirely *different and distinct* from, and were intended to be distinct from cases *in law and equity* whether they arose under the Constitution or laws of the United States, or otherwise.

"Now, if the appellee in this case contends that jurisdiction, irrespective of diversity, was vested in the District Court of the United States solely by reference to § 1333 of Title 28 [U.S.C.], then it is our contention that any such assertion is fruitless." (Tr. pp. 9-10.)

Authorities: A. Constitutional provisions, *supra*. B. "Cases of admiralty and maritime *Jurisdiction*" [The Constitution does not say that the federal courts shall have Jurisdiction of all admiralty and maritime *Cases*. It uses the phrase "all Cases of admiralty and maritime *Jurisdiction*"]. As of the time of the framing and ratification of the Constitution, "Cases of admiralty and maritime *Jurisdiction*" as known and understood by the persons domiciled in the British Colonies for approximately 100 years up to the time of the Declaration of Independence, July 4, 1776, and thereafter until the ratification of the Constitution of the United States, were those based upon *substantive* admiralty and maritime *rights of ac-*

tion. There was no admiralty or maritime "trial by jury" *remedy*. The mode of trial was that of the "civil law"; and the [judicial power] jurisdiction, in respect of *all* [in rem *and* in personam] such Cases was vested *exclusively* in the Admiralty Court [the judge]. (Benedict on Admiralty, Sixth Edition, Vol. IV, p. 397, § 699; pp. 398-401, §§ 700-704; pp. 405-537, §§ 707-718; pp. 438-442, §§ 719, 725; pp. 443-449, §§ 726-733, pp. 450-456, § 734.) Pursuant to this incontrovertible *historical* authority, no action maintained under the Jones Act is a Case "of admiralty and maritime Jurisdiction" as those words are used, in their *context*, in the Constitution (*supra*).

"Therefore, we get down to the meat in the cocoanut, and we contend that Jurisdiction, if it be vested at all, would have to be predicated upon diversity of citizenship on the law side of the court, and that the complaint would have to aver the other things which we have alluded to in the first part of our brief in respect of a common carrier engaging in interstate or foreign commerce, and that this man was injured while employed in such commerce, and so forth, because the jurisdiction of all courts of the United States is exclusively statutory; and I use that in a broad sense intending to include the Constitution of the United States as a statute, which I think it is. So that everything must stem from there. Congress has *no* power excepting as it is vested in the Congress *by* the Constitution, and the courts of the United States have *no* jurisdiction excepting as it stems from the Constitution and laws which are in themselves *constitutional* as enacted by the Congress of the United States." (Tr. pp. 10-11.) *Ex parte Richard Quirin*, 317 U.S. 1, 25-26, 87 L.Ed. 3, 11; *U. S. v. Butler*, 297 U.S. 1, 62-63, 80 L.Ed. 477, 486-487; *Calder v. Bull*, 3 Dall. 386, 387-388, 1 L.Ed. 648, 649; and *Youngstown etc. Co. v. Sawyer*, 193 F. Supp. 569, 197 F.

2d 582, 343 U.S. 579, 585-589, 96 L.Ed 1153, 1166-1168, 26 A.L.R. 2d 1378.

6. "The appellant contends that there are well-defined and thoroughly established statements of the principles of law involved in the relationship of master and servant, or as we refer to it nowadays, employer and employee; and also in respect of what constitutes or is the meaning of the common-law phrase, 'in the course of his employment', the common-law phrase, 'common carrier', the common-law phrase, 'employed in such commerce by such carrier', the word, 'negligence', the words 'contributory negligence', the words, 'assumption of risk', and the fellow-servant doctrine."

Authorities: "In the course of [the] employment": *McDonough, Admr. v. Buckeye S.S. Co.*, 103 F.Supp. 473, 200 F.2d 558, Cert.Den., 345 U.S. 926, 97 L.Ed. 1557; Re-statement of Agency, Sections 228 and 229 (cited as authority in *McDonough, Admr. v. Buckeye S.S. Co.*, *supra*), provide as follows:

"(1) Conduct of a servant is within the scope of employment if, but *only* if:

"(a) it is of *the* kind he is employed to perform, as stated in § 229;

"(b) it occurs substantially within the *authorized* time and *space* limits, as stated in §§ 233-234; *and*

"(c) it is actuated, *at least in part*, by a purpose to serve the master, as stated in §§ 235-236. [These *three* elements must exist *concurrently*]

"(2) It is a question of fact, depending upon the extent of departure, whether or not an act, as performed in its setting of time and place, is so different in kind from that authorized, or has so little relation to the employment,

that it is not within its scope.” (Restatement of the Law, Agency, § 228, p. 505.)

“Kind of Conduct Within Scope of Employment.

“(1) To be within the scope of the employment, conduct must be of the *same general nature* as that *authorized*, or incidental to the *conduct* authorized.

“(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

“(a) whether or not the act is one *commonly* done by *such* servants;

“(b) the *time, place* and *purpose* of the act;

“(c) the *previous* relations between the master and *the* servant;

“(d) the *extent* to which the business of the master is *apportioned* between *different* servants;

“(e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

“(f) whether or not the master has reason to expect that *such* an act will be done;

“(g) the *similarity* in quality of the act done to *the* act authorized;

“(h) whether or *not* the instrumentality by which the harm is done has been *furnished* by the master to *the* servant;

“(i) the extent of departure from the normal method of accomplishing an authorized result; and

“(j) whether or not the act is seriously criminal.”

(Restatement of the Law, Agency, § 229, pp. 507-508.)

“In creating and maintaining the conditions of employment, the master has a duty to his servants to have precautions taken which *reasonable* care, intelligence, and regard for the safety of his servants require.” (Restatement of the Law, Agency, § 493, pp. 1152-1153.)

“Time When and Place Where Duty Exists.

“The duty of the master to a servant to furnish *reasonably* safe conditions exists *only* while the servant is *properly* acting within the scope of his employment or while, in connection therewith, he is *in a place or vehicle* in the control of the master in which he is then *required* to be by reason of *his* employment or which has been *provided for use* incidental to *his* employment.” (Restatement of the Law, Agency, § 497, p. 1161.)

With respect to this last section, appellant quotes Comment “b” as follows:

“b. *When servant is on premises.* The master’s duty of protection includes the safeguarding of the servant in *places* upon the master’s *premises*, or premises under the master’s control, in which the servant is *required* to be, not only during his employment, but also in going to and from it, both at the beginning of the employment and at its termination. Likewise, it includes *such* a duty while the servant is doing a *necessary* act for his own comfort or convenience during the period of employment, or is inactive, *provided* that *the* conduct is *permitted* by the *terms of the employment*. The fact that the servant is momentarily not working is immaterial.” (Restatement of the Law, Agency, § 497, Comment: b., p. 1162.)

“Comment:

“d. *Servant not in scope of employment.* When the servant is upon the land or vehicle of the master *not* in

connection with his employment, *whether or not* at a time when he is required to be there by reason of it, the liability of the master to him is the same as that of any possessor of land or operator of a vehicle to a third person. If the servant is acting so *improperly* that he loses the privilege of a servant to be upon his master's premises or, if he is *otherwise* there without *privilege*, the master is liable to him for the *condition* of the premises or vehicle or for the *conduct* of his other servants only as he is to a trespasser. On the other hand, if the servant is upon the land or vehicle as a *business visitor* or *gratuitous licensee*, the master is liable to him as to other visitors or licensees. * * *." (Restatement of the Law, Agency, § 497, Comment: d., p. 1164.

Contrary to the holding of the Supreme Court [in respect of the *essential* averments of a complaint] in *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 297-298, 100 L. Ed. 100, 103; and of *this* Court, in reference to other elements, in *Valeski v. Pac. Atl. S.S. Co.*, 166 F. 2d 553, the case of *Ford v. United Fruit Co.*, 171 F. 2d 641, and foregoing *accurate and complete* statement of common-law rules; and the cases of *Philadelphia etc. Co. v. Passinier*, 9 F. 2d 854, 856; *Philadelphia etc. Co. v. Thirouin*, 9 F. 2d 856, 858; *Philadelphia etc. Co. v. Bartsch*, 9 F. 2d 858, 860-861; the California District Court of Appeal, in *Anderson v. Chamberlin*, 142 C.A. 2d 591 (298 P. 2d 901), at p. 610, states as follows:

"In construing 'course of employment' the courts do not, as contended by respondent, confine it to the performance of assigned duties at a 'required' place, but on the contrary, the holding is that a seaman 'is considered to be *in the course of his employment* if engaged in *any* matter *incidental* to his required duties' (*Sundberg v. Washington Fish & Oyster Co.*, *supra*, p. 803). For the

purpose involved in the case at bar, a seaman is at his place of work when he is at a place on or off the ship for 'a purpose connected with his employment' by the ship-owner (*States S. S. Co. v. Berglann*, 41 F.2d 456, 457). The test as to whether the seaman was acting in the course of his employment would seem to be whether at the time in question he is acting '*in the vessel's interest*' (*Wong Bar v. Suburban Petroleum Transport*, 119 F.2d 745, 746; *Nowery v. Smith*, 69 F.Supp. 755, affirmed 161 F. 2d 732; *Pedersen v. United States*, 122 F.Supp. 614, 618, affirmed 224 F.2d 212).

"Involved in determining whether appellant was acting in the course of his employment *two* (sic) questions are presented, (1) what was he doing at the time of his injury, and (2) the location, away from his regular work place, of the spot where the injury occurred. From an examination of the cases we are satisfied that the evidence in the case at bar, under proper instructions would support a finding that appellant was within the course of his employment. It is respondent's contention that appellant herein cannot recover because his injury was the result of his being at a place where he was not required to be in the performance of his duties as a chief-steward, but the *weight* of authority would seem to be that a seaman is entitled to recover so long as he was *not* at a [*regardless of where it may have been anywhere on the ship*] place on the vessel where he was *forbidden to be*. The tenor of the foregoing instructions given in the case now under consideration is that appellant cannot recover unless he was 'required' to be at the place where he was injured. Our view of the law is that though the seaman leaves the place where he performs his primary tasks, if injured, he may recover if he left such a place to do *something* connected with and in aid of the task assigned to him."

The “forbidden to be” part is based upon a broad statement in *Alden v. U. S. etc., Corp.*, 24 F.2d 159, 160. In its context, it is clear that the Court was using the phrase “forbidden to be” as synonymous with the preceding language “as the evidence did not show that it was not *permissible* for the appellant to be in the engine room before going to the pumproom after the required lights were furnished.” The actual testimony of Alden is set forth in the Appendix.

7. “The Jones Act has *two* segments to it. No. 1, it provides for a right of action for personal injury by a living seaman. But that Act and actions truly under it are not governed, I respectfully submit, by the substantive admiralty and maritime law, for the simple reason—and this is something which I don’t believe has ever been decided by any court; it has never been submitted to any court as a disputed question of law. The appellant is so submitting these questions in respect of the proper construction of this statute as disputed questions of law. The first disputed question of law is this: This Jones Act—when I say ‘Jones Act,’ I mean only the words you can find in Section 33 of the Merchant Marine Act—says that ‘in any action for personal injury maintained by a seaman, all statutes of the United States modifying or extending the *common law right or remedy* in cases of personal injury to *railway* employees shall apply.’

“Now, the Congress didn’t say that in these actions the general admiralty and maritime law shall apply. It said, the common law as modified or extended by the Congress in the Federal Employers Liability Act. Therefore, if there is any conflict between some basic principle of the so-called general admiralty and maritime law and the modified or extended common law pursuant to the statutes enacted by the Congress of the United States in respect of railway employees, then I respectfully contend that the

statute controls, and that therefore, the rules of law, the substantive and basic rules of law applicable even in an action by a seaman for personal injuries, is the common law of England as recognized by the courts of the United States, excepting to the extent that it has been modified or extended by the Congress; or, to express it in another way, the common law, as modified and extended, is still a part of the common law. It may be more; it may be less. But it is still a part of the common law. Therefore, in these actions the basic substantive law which is applicable is the common law as modified and extended by the statutes. The Congress didn't say a single word in this Jones Act about admiralty, didn't even mention the word. It says nothing about maritime. It says nothing about admiralty and maritime jurisdiction. Of course, Congress knew that those things were in the Constitution of the United States, and they deliberately left them out. At least we have got to assume, I think, that Congress was composed of men who were competent and who knew what they were doing and intended to do what they did and accomplished it. In any event, the language is clear and unambiguous, and I contend that nobody can take that statute and find any ambiguity in it. The only possible room for construction is the following: What statutes of the United States modify or extend the theretofore existing common law right or remedy in cases of personal injury to railway employees, and to what extent did those statutes modify or extend the theretofore existing common law right or remedy? Of course, we know right away [that] the old common law was modified in certain respects, and I am not going to burden your Honors with a dissertation of what I think will constitute all of the modifications. I will just mention a couple. For example, the fellow servant defense was swept out from under the feet of the employers of these railroad men who were employed by common carriers engaging in interstate commerce. Con-

tributory negligence ceased to exist as a complete defense, but became only a partial defense to the extent to which the negligence of the railway employee proximately contributed to his own total damage.” (Tr., pp. 11-14.)

Authorities: *Johnson v. U. S.*, 333 U.S. 46, 49, 92 L.Ed. 468, 472; *DeZon v. A. P. L.*, 318 U.S. 660, 665, 87 L.Ed. 1065, 1069; *Chesapeake, etc. Co. v. Kuhn*, 284 U.S. 44, 46-47, 76 L. Ed. 156, 160; *Bailey v. Central Vt. Co.*, 319 U.S. 350, 352-353, 87 L.Ed. 1444, 1447; *Roberts v. United Fisheries Vessels*, 141 F.2d 288; *Pietryzk v. Dollar Steamship Lines*, 31 C.A.2d 584, 592-593; and Title 45 U.S.C. §§ 51-56, with the *exception* of that part of the last mentioned section which provides as follows: “The *jurisdiction* of the courts of the United States under this chapter shall be *concurrent* with that of the courts of the several States.” This abortive attempt to vest jurisdiction in the courts of the several States is unconstitutional, being in clear contravention of Article I, Section 8, Article III, Sections 1 and 2; and Amendment X. On the other hand, in spite of what the Supreme Court of the United States said in respect of the intent of the Congress, in using the word “jurisdiction” in the last sentence of the Jones Act, Section 56, Title 45, U.S.C., demonstrates that the Congress knew and recognized the distinction between venue and jurisdiction. The first sentence of the second paragraph of said Section 56 is relevant solely to the question of venue. The second sentence of said paragraph purports to deal with “jurisdiction”. Therefore, it may be reasonably argued that “jurisdiction” as used in the Jones Act meant, and was intended by the Congress to mean “judicial power”. This point in respect of said Section 56, has never been submitted to or decided by the Supreme Court of the United States as a disputed question of law, either under the Federal Employers’ Liability Act or the Jones Act.

8. "With reference to actions of negligence under the common law, in actions involving master and servant, I contend on behalf of the appellant here that the [*substantive*] law and all of the law which is or can be applicable to any case, whether it involves a railroad man or a seaman, in respect of the duty of the employer as to the place of work is set forth in 56 Corpus Juris Secundum, Section 219, Subdivision B, pages 931 to 932. I also want to call your Honors' attention to a subject which is quite important in our case from the factual standpoint, to wit, this question of artificial illumination in mast house No. 2 on April 24, 1951 when they claim this man in some way got into this ventilator shaft. In that respect I respectfully call your Honors' attention to 56 Corpus Juris Secundum, Section 219, Subdivision C, commencing on page 932, the headnote reading, 'The duty to furnish a safe place of work includes the duty of furnishing sufficient light when *necessary*.' And right there, if your Honors please, is an example of something I refer to in my brief. We can all find hundreds of cases where courts, high courts, have said, 'It is the duty of the employer to furnish a safe place to work', period. That is not the duty at all, and no court has ever said so when it was submitted to it as a disputed question of law." (Tr. pp. 15-16.)

Authorities: "While *ordinarily* the duty of the employer to furnish employees a *reasonably* safe place to work is limited to the premises where the employees are *required* to be for the purposes of their employment when used in the ordinary way for the purpose for which they were intended, it nevertheless extends to such other places as they are expressly or impliedly invited and permitted to use; and this includes rooms and places *properly* resorted by them incidentally to their employment, by virtue of such an invitation or permission, but not to places

[where] the employee goes for his own convenience and [or] where he is not expected to be.

“Ways. The master’s duty to use ordinary care to furnish the servant with a reasonably safe place for his work is not restricted to the identical situs of the labor, but extends to the exercise of ordinary care to see that the means of egress and ingress and ways customarily used by *the* servant in passing from one part of the premises to another in the course of his employment are reasonably safe, since a place provided for employees in going to and from work is a place of work. . . . Where, however, the employer contracts to do work on the premises of another, it has been held that he is under a duty to see that the means of ingress and egress on such premises are kept reasonably safe, even though he has no control over such means so that he can directly remedy conditions therein, where he can compel the owner to do so or refuse to proceed with the work until the condition is remedied.

“Lights. The duty of the master to furnish the servant with a safe place of work includes the duty of furnishing sufficient light when *necessary* for the place of work, and this duty extends to passageways and stairways used by the servant in going to and from his work and from place to place in the course of his employment. A master, however, will not be guilty of negligence because of the absence of light where he has furnished a proper and complete equipment for lighting the place and has intrusted the turning on and off of the light, as an operative detail of the business, to a competent servant, nor will he be liable for the failure of the coemployees as between themselves to avail themselves of the means of lighting at hand. Liability for failure to furnish lights is not affected by the doctrine that the employer is not liable for injury resulting from a shifting character and condition of risk.”

9. "Now, the next thing has to do with the certificate of inspection which was introduced in evidence and as to which the trial court told the jury, 'No certificate of inspection may suffice for your duty.' Now, he had told the jury that its duty was to decide whether the defendant was or was not negligent. I contend that the certificate of inspection having been executed under oath by a duly constituted government official in the Coast Guard of the United States, taken in conjunction with the statutes which prescribe the specific duties which are involved in such an inspection, was enough *in and of itself*, particularly with the description of the extent and minuteness of these inspections as given by Captain Dyer, the marine superintendent of the appellant,—was enough in and of itself to permit the jury to infer that this particular part of this steamship was reasonably safe; and if the jury had been permitted to make such a finding, then, of course, it could also have found that the defendant, with knowledge of the requirements of the law and with knowledge of the fact that all of these inspections had been made not only in Portland and Seattle but all over the United States, and covered at least 45 of the exact same type of ship, the jury would at least have been entitled to infer that the defendant, in the exercise of ordinary care, and particularly in the exercise of that amount of foresight, not *hindsight*, but foresight, which the law requires to be exercised by an employer, was entitled to assume that this ship was in all respects at least reasonably safe, particularly when it was to be used by a so-called able seaman, and that it was entitled to *rely* upon that assumption unless there was *evidence*, direct or indirect, from which the jury could also have found that the defendant had *notice*, actual or constructive, to the contrary. Now that, I think, is a very important point in this case, and in that respect I call your Honors' attention to the late decision of the Supreme Court of the State of California

written by His Honor, Judge Spence, with the—and I say this in all kindness—usual dissent by Judge Carter—but in this decision the court says, ‘it is an elementary principle that negligence is gauged by the ability to anticipate danger.’ Then the court goes on to define what ‘reasonable foresight’ is and that it is essential to the concept of negligence.” (Tr. pp. 16-17.)

Authorities: A. “While not conclusive on the question of negligence, the adoption by the master of the customary and approved means or tests for the discovery of defects in his machinery or appliances, will, as a rule, discharge his duty to his servants in that regard, and an injury sustained by a servant notwithstanding must be accepted as resulting from one of the risks of the occupation. However, a custom not to inspect will not relieve the employer of the duty to do so.”

56 C.J.S. p. 998; § 240.

“An *official* inspection and test of the employer’s place of work, machinery, or appliances by a public official or officials, pursuant to a statute providing therefor, do not *necessarily* relieve the employer from the duty, with respect [to] an employee, of making further tests. The fact that appliances or machinery have not been condemned, or that notice of defects therein has not been given to the employer, by a statutory inspector, is not conclusive on the question whether such machinery or appliances are safe and does not relieve the master from the duty of safeguarding such apparatus as required by statute, and the fact that a factory inspector has approved machinery or appliances does not relieve the employer from liability for negligence in respect thereof.

“A contractor who arranges with the owner of a ferry-boat to transport his workmen to and from their place of work has been held entitled to rely on a certificate of the boat’s seaworthiness provided by United States authorities

charged with the duty of inspection and responsible for the release of the vessel for service, *unless* notice of its unseaworthiness is brought home to the contractor.”

56 C.J.S. p. 999; § 242.

B. “It is an elementary principle that negligence is gauged by the ability to anticipate danger. ‘[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. . . . On the other hand, one is not bound to foresee every *possible* injury which *might* occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid.’ (65 C.J.S. § 5c (2) (a), pp. 354-359.) This principle of foreseeable danger as the basis for liability underlies the doctrine of the leading case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 [162 N.E. 99, 59 A.L.R. 1253], where Justice Cardozo recognized actionable negligence as involved in proceeding at reckless speed through a crowded city street, but stated at page 100: ‘If the same act were to be committed on a speedway or race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.’ ”

Tucker v. Lombardo, 47 Advance California Reports, 461, 468-469, 303 P.2d 1041, p. 1046.

10. “Now the next thing that I want to talk about is this evidence on the so-called custom to search a ship and the so-called custom of some, maybe two—no other number is mentioned; it just says, ‘other ships’—this is Amundsen—he said he saw a screen over the top of the ventilator shaft which was surrounded by pipe railings. Captain Crawford said he had seen a heavy screen in place

of the pipe railings. Now, that is not evidence which amounts to a *general custom* or *general practice*. It is not evidence showing that steamship operators in the business customarily or ordinarily put screens there or have these other things there.” (Tr. p. 18.)

Authority: Appellant joins with the appellee and is satisfied that one sentence in an authority cited by appellee sufficiently and completely covers this issue of law: “When the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the *ordinary practice and custom* which is *generally followed* in the performance of such act under *the same or similar circumstances* is competent.”

Burke v. Marshall, 42 C.A.2d 195, 203-204, 108 P.2d 738, 743; (Appellee’s Brief, pp. 19-20).

11. “... in Corpus Juris Secundum it says on page 998, Section 240, ‘The adoption of customary and generally approved methods of inspection or tests by an employer for the discovery of defects or dangers in his machinery, appliances or place of work is ordinarily held sufficient, but a custom not to inspect will not relieve the employer of the duty to do so.’ That has reference to the evidentiary effect of that certificate of inspection which His Honor, Judge Tolin, told the jury would not suffice in and of itself for their performance of their duty, to wit, it wouldn’t permit them to render a verdict in favor of the defendant.” (Tr. pp. 18-19.)

Authorities: Supra, 56 C.J.S. p. 999, § 242.

12. “. . . there is a late case where a jury verdict in favor of a defendant in a F.E.L.A. case was reversed because of a half sentence, that half sentence having to do with this question of custom. The court told the jury that if the defendant acted in accordance with the ordinary practice, then the plaintiff couldn’t recover; and the [Ap-

pellate] court thought that was bad enough to reverse the case, no matter what else the judge had said in his instructions.” (Tr. p. 19.)

Authority: “The alleged error in the charge with respect to negligence is governed by somewhat different considerations. Defendant’s counsel within the hearing of the jury requested the court to charge ‘that as a matter of law it is not necessary for the defendant to provide the best or the newest and latest stairs or paint nor that the ship be accident proof. It is enough if the steps and paint provided *are commonly used and accepted in the industry at the time.*’ The court replied: ‘I will so charge.’ Plaintiff remained silent throughout this colloquy, and the case was then submitted to the jury. . . .

“The trial judge charged the jury, at defendant’s request, that ‘it is enough if the steps and paint are commonly used and accepted in the industry at the time’. This instruction was erroneous. While the *customary practice of the industry* is relevant and admissible, the defendant’s standard of care in a negligence action is not limited to complying with usual practice in the industry or trade. *Wabash R. Co. v. McDaniels*, 1883, 107 U.S. 454, 460-461, 2 S.Ct. 932, 27 L.Ed. 605; *Poignant v. United States*, 2 Cir., 1955, 225 F.2d 595; *Uline Ice, Inc. v. Sullivan*, 1950, 88 U.S.App.D.C. 104, 187 F.2d 82; *The T. J. Hooper*, 2 Cir., 1932, 60 F.2d 737.

“Consequently, plaintiff is entitled to a new trial on the issue of negligence as well as that of unseaworthiness.”

Troupe v. Chicago, etc., Co., 234 F.2d 253, 259, 260.

13. “. . . Counsel for appellee has told your Honors that one of the instructions that I complained of and cited the case of *Thompson v. Camp*, amongst others, is not supported by the authority, and he quotes an excerpt from

the opinion. True it is, the court said what he quoted. Reading the instructions [in *Thompson v. Camp*] as they were given, your Honors will find that the trial judge told the jury all about the effect of knowledge and notice on the part of the injured man in spite of the fact that he [also had] told them that in the absence of notice to the contrary, he could assume thus and so. In our case there is no possible room for any assumption by Mr. Hutchison. He had actual notice of every condition in that mast house, according to their own uncontradicted evidence.

“Now, I offered counsel for the plaintiff and appellee a copy of these instructions which I had copied out of the *Thompson v. Camp* file, and he said he didn’t want them, but I am going to give them to him anyhow, and if I may, I will give your Honors the original and two copies. It’s a Chinese copy. Your Honors will find that some of it doesn’t make sense. But the particular parts that are important do make sense.” (Tr. pp. 19-20.)

[The particular portion of the instructions in the case of *Thompson v. Camp* to which I direct this Court’s attention are contained in the typewritten copy of the instructions furnished to the Court at the time of the oral argument, from and including line 9, page 20 to and including line 9, page 23.]

14. “Now with respect to this question of whether or not pain and suffering after the sustaining of a personal injury is or could be a personal injury in the course of the employment, I would be less than honest with the Court, and less than honest to myself, if I didn’t tell you about a decision which I found, a decision of the Supreme Court of the United States, in the case of *Anderson v. Atchison, Topeka & Santa Fe Railway Company*. That case arose in the courts of California. The contention of the administratrix in that case was that the deceased was

a railroad man, a conductor, and that he had disappeared from a moving train while it was at or near a certain station. There was no negligence alleged in respect of how he got off the train, none at all. [A careful examination of the *complaint* in the petition for a writ of certiorari, shows to the contrary.] But these railroad men knew he was off the train and knew the only place he could be, he either jumped or fell off, and that if he fell off, he might have been hurt. Anyhow, he fell off or got off in a place where it was freezing. So they went on, passed several stations, and nobody did anything until they got to a place called Yeso, New Mexico, and then a telegram was sent back to some other office, and the Complaint alleged that the other office waited an unreasonable time before telling anybody to go look for this man. And to make a long story short, when they finally found him, he had suffered such severe injuries or illnesses, or whatever you want to call it, from exposure to this freezing weather, that he died three days after he was found. Now, that is the case, as I say, of *Anderson v. Atchison, Topeka & Santa Fe Railway Company*, 333 U.S. 821, 92 L.Ed. 1108. But here is what I would like to have the Court consider: The Supreme Court didn't even mention in that case whether these freezing injuries were suffered while this man was actually in the course of his employment in interstate or foreign commerce. In other words, the question of whether he was or was not in the course of his employment at the time he was frozen was not suggested to the United States Supreme Court because it didn't say anything about it. Now, as I contend, the Constitution of the United States and the statutes enacted by the Congress are the supreme law of the land, and the statutes control, and if a court, even such a high court as the United States Supreme Court, overlooks a *pertinent* part of a statute, that decision is not precedent in respect of

the *complete* statute, and the court so held in the Jones Act case of [Pacific Steamship Company v. Peterson], *supra.*" (Tr. pp. 22-23.)

Comment: The reason for the omission is clear from the Transcript of Record, Supreme Court of the United States, October Term, 1947, No. 620, *Anderson v. The A. T. & S. F. Ry. Co.*, on the petition for a writ of certiorari to the Supreme Court of the State of California. The complaint alleged, paragraph II, "that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in the State of New Mexico, State of California, and other states. (Par. 2, 1st Cause of Action, Petition, p. 1.)

"That *at all times herein mentioned*, defendant was a common carrier by railroad engaged in interstate commerce and L. C. Bristow, deceased, was *employed* by defendant in *such* interstate commerce and *the injuries to deceased hereinafter complained of and which resulted in his death, arose in the course of and while deceased and defendant were engaged in the conduct of interstate commerce.*" (Par. III, Complaint, Petition, pp. 1-2.)

These allegations of paragraphs II and III were incorporated by reference thereto in the second cause of action, the one which was the subject of the opinion of the Supreme Court of the United States. (Petition, p. 3.)

In the answer filed by the railroad company paragraphs II and III of the plaintiff's first cause of action, hereinabove referred to, were *affirmatively* admitted. (Petition, p. 5.)

The same allegations, as incorporated in the second cause of action, paragraph I, second cause of action (Petition, p. 3) were *affirmatively* admitted by the defendant. (Par. XII, Petition, p. 6.)

This explains why the Supreme Court of the United States did not go into the subject which is involved in this particular point in the case at bar.

15. "Now, we get to the point where we have a disputed question of law. The Jones Act by its terms is restricted to personal injuries suffered in the course of the employment. No seaman can act in the course of his employment unless he has the physical qualifications which are required by the statutes and by the rules and regulations for licensing and certificating merchant marine personnel. Obviously, if your Honor is the master of a ship and you sign a man on foreign articles, and he has both legs cut off, that terminates the contract of employment, if that man is a seaman. He is no longer acting in the course of his employment because he cannot any longer perform any personal services." (Tr. p. 23.)

Authorities: A. Title 46 U.S.C., § 672, provides specifically for the division of the complete crew of a vessel into three separate and distinct departments, to wit: deck crew; engine department; and food-handlers. In respect of able seamen, the statute provides as follows: "... That upon examination under rules prescribed by the [Coast Guard] as to eyesight, hearing, and physical condition, and knowledge of the duties of seamanship, a person found competent may be rated as able seaman after having served on deck twelve months at sea or on the Great Lakes, . . . Application may be made to any board of local inspectors for a certificate of service as able seaman, and upon proof being made to said board by affidavit and examination, under rules approved by the Secretary of Commerce, showing the nationality and age of the applicant, the vessel or vessels on which he has had service, that he is skilled in the work usually performed by able seamen, and that he is entitled to such certificate under the provisions of this section, the board of local inspectors

shall issue to said applicant a certificate of service as able seaman, which shall be retained by him and be accepted as prima facie evidence of his rating as able seaman.” (46 U.S.C., § 672.)

[The “Rules and Regulations for Licensing and Certifying of Merchant Marine Personnel” as contained in the bound booklet designated “C.G. 191” are, I believe, the same as those which were in effect on April 24, 1951, in respect of the matters and things pertinent to the issues in the case at bar.] The requirements in respect of physical and other matters are set forth in Section 12.05. 12.05-5(b) provides: “The medical examination for an able seaman is the same as for an original license as a deck officer as set forth in Section 10.02-5 of this subchapter. . . .”

10.02-5, referred to, *supra*, reads as follows: “All applicants for an original license shall be required to pass a physical examination given by a medical officer of the United States Public Health Service and present a certificate executed by this Public Health Service Officer, to the Officer in Charge, Marine Inspection. This certificate shall attest to the applicant’s acuity of vision, color sense, and general physical condition. . . .”

B. “A contract of employment for personal services is *terminated* by the death of the servant, or where by reason of insanity, sickness, or other disability, or conviction of a felony he is not able to perform his contract, *unless* the parties have *contracted* to the contrary. . . . Illness of the employee, however, does not ipso facto breach the employment contract to such an extent as to terminate it. Whether it is terminated thereby depends on the facts of the particular case, the period of illness, its nature, the kind of service rendered, and other facts. Ordinarily the employment will not be regarded as terminated by the employee’s illness *if* he is able to return

to his employment within a *reasonable* time or if the disability is *temporary* and does *not* in any substantial manner prevent performance on the part of the employee; but the protracted illness of an employee whose services are of *immediate* necessity, or are of such a *special* character that no ordinary person can perform them, so that it is necessary to obtain the services of a *skilled* person in order to continue the business, furnishes ground for the employer to declare the employment terminated. . . .

“Notice of termination. Where an employee has been sick for an appreciable length of time whereby he is unable to perform his duties it has been held not to be necessary to give notice of the termination of the contract, as in such case the right to terminate the employment does not depend on giving notice to the employee but on the fact that he has become unable to render the services on whose continuance the employment depends.”

56 C.J.S. pp. 423-424; § 38.

16. “One other thing on this question of the search and failure to find, and so forth. There is no allegation in the Complaint, and there is no proof that any person who was an agent of the appellant had actual or constructive notice of the fact that this man was or could have been in this ventilator shaft. The master is the one who is the agent of the ship operator for the purpose of providing, not *specialists*, but ordinary medical care and attention, but only for such injury or illness as is suffered *in the service of the ship*. Now, when a man is lying in bed fatally ill with pneumonia, for example, or with both arms and both legs cut off, he certainly can’t be acting in the course of his employment.¹ And therein lies

¹“Before considering these questions, now acutely presented upon a meagre and inadequate record, we may state our opinion that a seaman ‘falls sick, or is wounded,

one of the principal and substantial objections to this so-called search for and discover theory which was concocted, I say, for the purpose of prejudicing the jury against the defendant because lawyers who are careful enough to include averments of proximate causal connection between an alleged negligent omission and a personal injury and a death, are not going to [be permitted to] claim or contend, in my book, that when they [add] a paragraph at the end of the Complaint, 'By reason of the premises said Hutchison was damaged to the extent of \$25,000,' that [that] is an averment of fact in accordance with the Federal Rules of Civil Procedure. Each averment in the Complaint must be simple, concise, and direct; not a conclusion but an averment of fact. And those averments of fact are entirely missing from the Complaint, and I have explained to your Honors why I think they left them out of the Complaint.'" (Tr. pp. 24-25.)

Authority: In respect of the question of agency,—2 Cal. Jur. 2d (Agency), pp. 855-866, §§ 160-166.

17. "There is one case that I just found. It is 221 Federal Reporter, p. 335. It answers one of the questions which we are asserting. In other words, here was a common carrier, a railroad which had tugs in New York Bay, and the court held that a seaman on a tug was entitled to sue under the Federal Employers' Liability Act, but only if the employer was engaging in interstate commerce at the time and the employee was employed in such

in the service of the ship,' if such misfortune attacks him while he is attached to the ship as part of her crew. It is not necessary that the wound or illness should be directly caused by some proven act of labor; it is enough that he was, when incapacitated, subject to the call of duty as a seaman, and earning wages, as such." (*The Bouker* No. 2, 241 F. 831, 833.)

commerce at the precise time of the sustaining of the injury. And that case I have Shepardized. It has never been overruled or criticized by any court, including State courts.” (Tr. p. 25.) [*Erie R. Co. v. Jacobus*, 221 F. 335, 337-342.]

“Mr. Gallagher. Your Honors, counsel has brought up a couple of new things. . . .

“Mr. Gallagher. The point is this: Mr. Simpson, the head of the firm, conceded at the trial court in the trial that Mr. Amundesen was not talking about Victory ships when he said ‘Other ships got screens here.’ That is on pages 560, 561, and 562. (Tr. of Record.) A juror asked that specific question. And Mr. Simpson said, ‘The reason I asked for the question is, it says, “On the shafts of other”’—and it is underlined—“Victory ships.”’

“‘The particular portion to which I referred in starting to answer this, to my knowledge, there is no testimony that they were seen on other Victory ships.

“‘The Court. It was on other ships? [Mr. Simpson] *That is correct.*’

“Now, No. 2, he told your Honors that you ruled in the first opinion that Paragraph IX of the Complaint stated a claim upon which relief could be granted. That was not even submitted to the court for decision. It is true, in your decision you mentioned the fact that a search was not made which resulted in finding him until the ship got to Philadelphia. But this court did not say that that was a cause of action, or that that would support a verdict, and, of course, I don’t blame counsel for that.

“Now, the next thing is, he cites this Ziegler case and calls it to your Honors’ attention. I want to call your Honors’ attention to this, that this action for damages for death is based upon the second part of the Jones Act,

and that says that in any action maintained by the personal representative all statutes of the United States conferring or regulating the right of action in case of the death of a railway employee shall be applicable. Now, that makes it very clear. It says, 'All statutes which confer or regulate it,' and they confer it only against the common carrier and in favor of an employee who is employed in commerce.'" (Tr. pp. 26-27.)

**ADDITIONAL AUTHORITIES ON INSUFFICIENCY OF THE
EVIDENCE AND SPECULATION.**

1. *Hawley v. Alaska Steamship Co.*, 236 F.2d 307.
2. *Atlantic Coast Line Rd. Co. v. Collins*, 235 F.2d 805, pet. for cert., by *Collins*, den. 1 L.Ed. 2d 238.

Respectfully submitted,

LASHER B. GALLAGHER,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

The printed Transcript of Record (No. 5023, Fifth Circuit) contains testimony of Alden, as follows:

“I am a marine engineer and have been off and on since May 6, 1920. On or about the 13th of June, 1923 I shipped on the Steamship ‘Keekoskee’ for a trip from Pensacola, Florida to New Orleans and from New Orleans to Baton Rouge. The United States Shipping Board Emergency Fleet Corporation employed me to go on the voyage. I was employed in the capacity of pump man. On the morning of June 20th I had an accident in the engine room. Q. How did you happen to be in the engine room? A. I was told to overhaul the pumps in the pump room by the Chief Engineer, and in order to overhaul them and to see that they were in working condition, we had to have lights, and I *got orders to go into the engine room* and start the generator. Q. Was it necessary for you to start the generator in order for you to have lights for the overhauling of the pumps? A. Yes, sir. Q. Did anyone go to the engine room with you? A. Yes, sir, the Assistant Engineer, William E. Brown and Carl Anderson. Q. Who was the one that was ordered to *start the generator*, you, or Brown or Anderson? A. Well, Brown was the one that was ordered to *start* it; he was employed in the capacity of Assistant Engineer. Q. *You and Anderson* went down to give him any assistance that might be *necessary*? A. Yes, sir. Q. When you all got down to the engine room on that occasion, tell us just what happened? A. We started the generator. Q. Who started it? A. And immediately after that why the steam came out from under the inspection plate. Q. How many minutes or seconds was it before the steam came out from under the inspection plate? A. Possibly five or ten minutes.” (Alden, Tr. of R., pp. 13-14.)

“Q. His duties relate to the care of the operation of the pumps? A. Yes, sir; and also to any other work that the Chief Engineer may deem necessary to perform from time to time.” (Alden, Tr. of R., p. 23.)

“Q. As I understand it, here is what happened; you were asked by the Chief Engineer to fix the pumps? A. Yes, sir. Q. And you advised the Chief Engineer at that time you would need lights down there in order to give you the opportunity of seeing what you were doing? A. Yes, sir. Q. And after you advised the Chief Engineer of that fact, he then instructed Brown and Anderson to go down with you to start the generator, so that you could get lights to do your work on the pumps, is that right? A. He did not instruct me to go into the engine room to *start the generator*, no. Q. He told Brown and Anderson *to go down there with you*? A. Yes, sir. Q. And told *them* to go and *start* the generator, so that you could have lights for your work on the pumps? A. Yes, sir. Q. That is *the reason for all three of you* going down there? A. Yes, sir.” (Alden, Tr. of R., p. 25.)

“Q. You say that within ten or fifteen minutes after the generator was turned on, and while you were *all* still down in the engine room, this steam escaped from under the inspection plate? A. Yes, sir. Q. Had you fixed the pumps? A. No, sir, I had not left the engine room yet. Q. The lights had not gone on? A. The lights were on, but I had not left the engine room yet. Q. You still stayed around the engine room? A. Yes sir. Q. What was your purpose for lingering in the engine room? A. *I was just staying there to see that they got everything all right and then go down in the pump room.* Q. Had they finished *starting* the generator? A. Yes. Q. What was your reason for staying around in the engine room? A. Well, there was no reason at all, so far as I can see, except on that work we were over by

it, that is all. Q. What were you doing over by it, that is what I am trying to get at? A. Well, I *went over there to look to see that everything was all right*. Q. What were you looking at? Did you go there to inspect the generator? A. No, but looking *everything* over to see that *everything* was *alright*. (sic)" (Transcript of Record, United States Circuit Court of Appeals, Fifth Circuit, No. 5023, *Alden v. U. S. Shipping Board, E.F.C. and S.S. "Keekoskee"*, pp. 12-29.)

No. 15,091

United States Court of Appeals
For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY,
a corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison,
deceased,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

LASHER B. GALLAGHER,

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Attorney for Appellant.

FILE

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No. 15,091

United States Court of Appeals For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY,
a corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison,
deceased,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Albert Lee Stephens and Frederick G.
Hamley, Active Circuit Judges; and the Honorable
Chase A. Clark, Chief Judge, United States District
Court, District of Idaho:*

INTRODUCTION.

Appellant addresses this petition for rehearing to your Honors solely because Rule 23 provides that "all petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing." This rule, literally read, *disenfranchises* seven active circuit judges of the United States Court of Appeals for the Ninth Circuit, the Court to which the appeal of appellant

was taken in accordance with the statutes enacted by the Congress. Article I, Section 8, U. S. Constitution, provides that the Congress shall have power to constitute Tribunals inferior to the Supreme Court. Article III, Section 1 of the Constitution provides that

“The judicial power of the United States *shall* be vested in one supreme Court, and in such inferior *Courts* as the Congress may from time to time ordain and establish.”

Section 2 of the same article provides that the judicial power shall extend to all cases, in law, arising under the laws of the United States. The Congress has provided that in the Ninth Judicial Circuit

“there shall be * * * a *court of appeals*, which shall be a court of record, known as the United States Court of Appeals for the Circuit” and that said “*court of appeals* shall consist of *the circuit judges of the circuit in active service.*” (Title 28, U. S. C. § 43.)

“The *courts of appeals* shall have jurisdiction of appeals from all final decisions of the District Court of the United States, . . .” (Title 28, U. S. C. § 1291).

The Congress has also provided as follows:

“Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

‘(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .’ ” (Title 28, U. S. C. § 1294.)

Appellant, Pacific-Atlantic Steamship Co., duly filed its notice of appeal pursuant to which it appealed “to the

United States Court of Appeals, Ninth Circuit (T. R., pp. 97-98); and thereby invoked the appellate judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit, said Court of Appeals consisting of the *nine* “circuit judges of the circuit in active service.”

It is, therefore, respectfully contended that no rule promulgated by the Court may lawfully divest any of the circuit judges of the circuit in active service of any of their judicial powers as part and parcel of the United States Court of Appeals for the Ninth Circuit in respect of any matter or thing which comes within the appellate judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit. The fact that “In each circuit the *court* may authorize the hearing and determination of cases and controversies by separate *divisions*, each consisting of three judges” does not justify the conclusion that at any time the United States Court of Appeals for the Ninth Circuit shall consist of three judges. A careful reading of all of § 46, Title 28, U. S. C., will, it is respectfully contended, lead to the conclusion that the words “a *court or division* of not more than three judges” in subdivision (c) were not intended by the Congress to mean that there shall or can be *three* separate United States Courts of Appeals for the Ninth Circuit, each such separate Court of Appeals consisting of three judges. The Congress no doubt could have constituted three separate and distinct United States Courts of Appeals within the Ninth Circuit. It did not do so and it must therefore be obvious that it did not intend to do so.

Whether a petition for a rehearing should or should not be granted, in any case within the judicial power and

appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit, consisting of the nine active circuit judges, is vitally more important than a determination, *after* a rehearing has been granted, whether the case shall be reheard en banc, or by the same or another division of the Court.

Section 46, Title 28, U. S. C. does not say that the judicial power and jurisdiction of the circuit judges of the circuit in active service is restricted in the sense that they have no authority whatever to decide whether a rehearing should or should not be ordered. Whether or not a rehearing should be granted is certainly a controversy. This controversy has not been heard or determined.

In the case of *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 97 L. ed. 986, 73 S. Ct. 656, the Court stated that

“it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division.”

The Court also suggested that

“in recognizing the full scope of § 46 (c), the full membership of the court will be mindful, of course, that the statute commits the en banc power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division. And, recognizing the value of an efficient use of the en banc power, the court should adopt such means as will enable its full membership to determine whether the court’s administration of

the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable.”

Rule 23, read literally, prohibits the Honorable William Denman, Chief Active Circuit Judge, and the Honorable Active Circuit Judges William Healy, Walter L. Pope, Dal M. Lemmon, James Alger Fee, Richard H. Chambers and Stanley N. Barnes from having anything whatever to do or say about whether a rehearing should or should not be granted.

The hearing and determination of a petition for a rehearing is a judicial act clearly within the judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit and said United States Court of Appeals consists not of two active circuit judges and one United States District judge but of all nine active circuit judges. Pursuant to a literal reading of Rule 23, the active circuit judges with the exception of Judges Stephens and Hamley are prohibited from having anything whatever to do or say about whether or not the case and its controversies shall be reheard at all, or whether or not, in the event the original panel or division grants a rehearing, the case should be heard en banc unless a majority of the panel or division as constituted in the original hearing give their permission to the other seven active circuit judges to participate. This participation is also limited by a literal reading of Rule 23, in the first instance, to the *single* point whether the case should be reheard en banc. Thus, the tail wags the dog.

Appellant respectfully contends that Rule 23, read literally, is in contravention of the provisions of the Constitu-

tion of the United States hereinabove referred to and of the statutes, aforesaid, enacted by the Congress; and of the true meaning and construction of Title 28, U. S. C. § 46, upon which it is purportedly predicated.

In *Western Pacific R. R. Corp. v. Western Pacific R. Co.*, 197 F. 2d 994, 1015, six of the active circuit judges enunciated the following rule:

“A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as it concerns the court of appeals.”

In further support of its contentions in respect of Rule 23, appellant cites the opinion of the Supreme Court of the United States in *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 97 L. ed. 986, 73 S. Ct. 656, the dissenting opinions of the Honorable James Alger Fee and Chief Judge William Denman in the same case when it was pending before the United States Court of Appeals, Ninth Circuit, said last mentioned opinions being found in Volume 197 F. 2d, pages 1012-1013 and 1016-1021; and subdivision 2 of Rule 4 which provides as follows:

“The chief judge after conference with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be *modified* or *set aside* by a majority of the judges.”

A good and sufficient reason for having each one of the nine active circuit judges know something about this case

and controversy before the United States Court of Appeals for the Ninth Circuit loses its appellate jurisdiction in respect thereof by the lapse of time is clearly stated by the Honorable Mr. Justice Felix Frankfurter of the United States Supreme Court as follows:

“To be sure, the non-sitting judges have not heard the argument nor read the briefs, and have no vote as far as the opinion of the panel is concerned. Presumably, however, an opinion *states* the issues and gives the *grounds* for its conclusion and thereby sufficiently alerts the minds of experienced judges to what is at stake. It taps their knowledge of the legal considerations that may lead, on the initiative of a non-sitting or of a sitting judge, to a determination by the entire court of whether or not a rehearing en banc is called for.” (*Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 271-272, 97 L. ed. 986, 1001.)

The opinion of the division or panel in the case and controversy at bar does not measure up to Mr. Justice Frankfurter's observation of what an opinion should be.

The opinion should be so composed as to readily alert the justices of the Supreme Court in respect of the legal issues raised by the specification of errors and the reasons underlying the decision from a mere reading of the opinion itself in the event they are called upon to consider the contentions of the appellant. There should not be any justification for a claim by the appellant on a petition for a writ of certiorari that its contentions have not been considered or decided. This panel or division should not leave the case in such condition that the Supreme Court will be compelled, in order to do its duty, to wade through

two appellate records and all of the briefs of appellant in order to find out whether justice has been administered.

The grounds of this petition are stated as follows:

Ground Number One: The panel or division has misstated some facts and also neglected to state other material facts as they appear in the Transcript of Record.

Rule 8 provides that

“The practice [here] shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.”

Rule 1 (e) requires that the

“Briefs of an appellant * * * shall contain * * * A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record.”

Appellant’s “Statement of the Case” is in strict accord with that Rule and your Rule 18. No one can point to a single inaccurate statement of the oral, photographic or documentary evidence as the appellant has set it forth in writing in its Opening Brief. As one of its grounds for a rehearing, appellant contends that it was the duty of this panel or division to consider and decide the legal issues involved upon the evidence as it actually exists in the Transcript of Record and not otherwise. When the Rules require an appellant to be accurate, fair and complete in its statement of the evidence in its brief there is a clear duty on the part of the judges to also be accurate, fair and complete in their statement of the facts in the opinion. This has not been done.

Ground Number Two: The opinion is a clear departure from the accepted and usual course of judicial proceedings in that this panel or division has neglected or refused to consider and decide the legal issues presented in the briefs and oral argument of appellant's attorney in the same clear and distinct manner in which the United States Court of Appeals for the Ninth Circuit has considered and decided such questions in the vast majority of other cases and controversies which it has adjudicated. The panel neglected or refused to state the actual averments, or even their substance, of the count designated as the "Second Cause of Action"; nothing whatever is said in respect of the contention that the "Second Cause of Action" of the amended complaint was fatally defective in two respects: (1) The failure to aver that the appellant was a common carrier engaging in interstate or foreign commerce or that Hutchison died as a result of personal injuries suffered by him while he was employed by such carrier in such commerce or that he was "a member of the crew"; and thus the pleading failed to aver facts showing that "the pleader *is* entitled to relief" pursuant to the *statutory* right of action for death in which it is *expressly* stated that *all* statutes of the United States conferring or regulating the right of action for death in the case of railway employees *shall* be applicable. (2) That for the same reasons the United States District Court was not vested with jurisdiction in respect of said "Second Cause of Action."

Ground Number Three: The opinion of the panel or division is opaque, vague and ambiguous. It completely fails to state the substance of the evidence admitted over

the objections of appellant or of the objections or motions to strike the same. It completely fails to state the substance of the *given* instructions objected to, the substance of the objections thereto; or the requested instructions which were refused or the objections made to such refusals. In fact, the opinion fails to state or to distinctly rule upon a single contention of appellant in respect of the "Second Cause of Action," as set forth in its written briefs or oral argument, excepting *one* that is *moot* in the absence of a refusal to consider the objections to instructions given or refused upon the sole ground that F. R. C. P. Rule 51 was *not* complied with. The fact that said contention was immaterial, under *such* circumstances, was asserted in the Opening Brief at page 143. Your implication that appellant asserted only *one* contention in respect of jurisdiction; and that said point was exactly that referred to in the first opinion is *entirely* incorrect. No question of jurisdiction in respect of the "Second Cause of Action" was raised or passed upon in the first appeal.

The language of the opinion can be compressed into two sentences, as follows:

"We do not *state* the substance or any part of the pleadings, say anything about the Federal Employers' Liability Act, the substance of the evidence introduced without objection or that introduced over objection, the substance of the objections, the substance of the instructions as given or refused or the objections thereto, the grounds of the motions for a directed verdict; or the specific contentions in respect of the questions raised in appellant's briefs and oral argument as to the jurisdiction of the trial Court or of

this Court on the first or second trial records. All of these contentions are *considered and decided* as follows: There is no merit in any of them.”

Ground Number Four: The panel or division has included in its statement of the facts which it says “shows an abundance of evidence that warranted the submission of the case to the jury” the following:

“The men who had been working with him concluded that he had gone ashore to take a day off, as sailors were in the habit of doing. He did not report for work the next day, April 25th. When on April 26th, he was again absent from duty, the chief mate telephoned the Baltimore police to inquire whether he was being held in custody. The police had no record of his being held. No other effort was made to ascertain his whereabouts. A search of the fore-castle and the mess room was made but no general search of the ship was instituted because it was assumed that he had gone ashore. The Linfield Victory left Baltimore supposedly without him, arriving at Philadelphia on April 29th. On April 30th, six days after Hutchison’s disappearance, his body was discovered by the chief electrician at the bottom of the ventilator shaft adjacent to the ladder leading to the tween decks area where the men had worked on April 24th.”

It is impossible for any member of the Bench or Bar to determine from the language of the opinion what you are referring to as “an abundance of evidence.” If you are referring to Crawford’s statement that in the course of his experience he had seen “a screen, a heavy screen which excludes the danger” as a protective device other than a protective device such as the guard rails around

the ventilator shaft, which would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity and that that screen would be located where the guard rails were (T. R., pp. 233-235), it is respectfully requested that the panel or division make that statement distinctly and directly so that the Justices of the Supreme Court of the United States, in the event this petition for rehearing is denied, will not have to search through the record to find out what evidence you have in mind. If by your language "abundance of evidence" you are referring to Amundsen's statement that "other ships got screens down here, and stuff like that," over the top of the ventilator shaft (T. R., p. 142), it is respectfully requested that you distinctly and directly so state. You should also state *when*, with reference to *April 24th, 1951*, either of these witnesses had seen what he claimed to have seen in the foregoing respects.

The attention of your Honors is particularly directed to the comment made by Judge Tolin on January 12, 1953, shown in the Reporter's Transcript of Proceedings, a part of the record of the first appeal in this Court, number 13,852, at page 726, as follows: "Your case, Mr. Simpson, was *not* a strong case *at the most*. It was a *very, very thin* case." (T. R., 1st Appeal, p. 726, lines 4-5.) It is difficult to understand how, in the face of *less* evidence having been introduced by the plaintiff at the second trial than she introduced during the first trial, the case has been so "*fattened up*" that the record now "shows an *abundance* of evidence that warranted the submission of the case to the jury." If your statement "an abundance of evidence" refers to the "search for and

discover'' theory of paragraph IX of the Complaint, and you intend to hold that evidence in the record with reference to a failure to search for and find Hutchison before he died is legally sufficient to have warranted the submission of the case to the jury and is legally sufficient upon *that* theory, to sustain the verdict of the jury on the Second Cause of Action, appellant respectfully requests and suggests that you say so distinctly and directly so that the Supreme Court of the United States will know the basis of your judgment affirming the judgment on the Second Cause of Action. The opinion in the foregoing respects is extremely vague, indistinct and uncertain.

Ground Number Five: The statement of the panel or division that "the allegations of the complaint are in the customary language of the Jones Act" is meaningless. There is no such thing as "*customary* language of the Jones Act." The language of the Jones Act is explicit. The language actually contained within the four corners of Title 46 U. S. C. § 688, is, because of the adoption thereof by reference thereto, exactly the same as the language of the Federal Employers' Liability Act to which specific reference is made. There is nothing customary about that language. It is also explicit.

Ground Number Six: The ruling that all that is required in an action at law in pleading a cause of action for damages by reason of the death of a seaman is that the complaint allege that the deceased was employed as a seaman and that the vessel was plying navigable waters is in direct conflict with the provisions of the death action portion of the Jones Act and the statutes of the United States made a part thereof by reference thereto. The decisions,

in the cases of *McKie v. Diamond Marine Co.*, 204 F. 2d 132 and *Schantz v. American Dredging Co.*, 138 F. 2d 534, involved personal injuries and had nothing whatever to do with the sufficiency of a complaint premised upon that part of the Jones Act which provides that

“in case of the death of any seaman as a result of any such personal injury [a personal injury suffered by a seaman in the course of his employment] the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.”

Ground Number Seven: Every statement of fact which you have made in the opinion, with reference to *conditions*, must have been intended to relate to the conditions at the *precise* time when Hutchison got into the ventilator shaft and fell to the bottom thereof. You say, therefore, in effect, that at the *precise* time of the fall “the ventilator shaft was *unlighted*.” The evidence shows without conflict that at about 8:00 A. M. on April 24, 1951, the door to masthouse number 2 was opened by Amundsen. There is no evidence that it was ever closed, thereafter, on that day at any time during working hours which terminated at 3:00 P. M. It is therefore presumed, in the absence of any evidence whatever to the contrary, that the condition with reference to the open door remained the same throughout the working hours. Thus, your statement that at the precise time Hutchison fell into the ventilator shaft, it was “unlighted” means that it was “pitch-dark”; and therefore the fall must have happened during

the *nighttime*. This utterly destroys any basis of a finding that Hutchison got into or fell into the ventilator shaft "in the course of his employment."

Ground Number Eight: No instruction whatever was given to the jury defining what is meant by the language "in the course of his employment." Appellant requested such instruction. It was refused. The jury was therefore left to its own unenlightened resources in determining whether Hutchison was or was not acting in the course of his employment at the precise time when he got into or fell into the ventilator shaft. You say nothing whatever about this omission in the instructions as given to the jury but it certainly is a very important element and legal issue involved on this appeal. This issue should be distinctly and directly ruled upon in the opinion.

Ground Number Nine: The opinion says absolutely nothing with reference to the contentions of the appellant that the comments made to the jury by the trial judge were unfair, one-sided and erroneous. For example, the trial judge commented upon the subject of contributory negligence as follows: "If, for instance, and this is just an illustration—I don't suggest to you it *is* true, *but you should consider whether it is*, and it is an illustration of that instruction—you believe from all the evidence that Mr. Hutchison was feeling rugged—whatever that means, but you have heard the testimony—and that he had a hangover, then you would consider whether or not a man, knowing that he felt rugged and having a hangover would go into *the type of act or acts* in which he *was* engaged at *the* time of the injury. That is, would he go about masthouses and *climb up and down ladders* or would he

take a sick leave? Was it ordinary prudence, was it reasonable care for him to do that?

“If you find that it was not or if you find there was some other contributory negligence—*at the moment as I sit here that is the only thing in the evidence which occurs to me*, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed . . .” (T. R., p. 513.) Appellant objected to this comment “upon the ground that that is an instruction with reference to *fact* which *deprives* the defendant of a *right to a jury trial*” and also contended that “it is a *violation* of our *constitutional* right to a jury trial.” (T. R., pp. 536-537.)

The opinion says absolutely *nothing* in respect of this important matter. It should be directly and distinctly ruled upon.

Ground Number Ten: The opinion is in conflict with that portion of Article VI, Clause 2, Constitution of the United States, which provides that

“This Constitution and the Laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme law of the land,”

in that you have ignored the language of the Jones Act and that of the Federal Employers' Liability Act incorporated therein by reference thereto, and have by judicial

legislation amended the statute by holding that all that is required in order to state facts sufficient to constitute a cause of action for damages by reason of the death of a seaman is that the complaint allege that the seaman was employed as a seaman and that the vessel was plying navigable waters. The words "a vessel plying navigable waters" are not in the statute.

Ground Number Eleven: The opinion is in direct conflict with that part of Amendment V, Constitution of the United States, which provides that

"No person shall be deprived of property without due process of law"

and of that part of Amendment VII, Constitution of the United States, which provides that

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

ARGUMENT.

(a) GROUND NUMBER ONE.

Perhaps, and appellant's attorney hopes it is not true, the "in camera" atmosphere of a vindication of the "esprit de corps" of the federal judiciary is responsible for the failure of the panel or division to perform its duty as has been the case in appeals involving other parties and attorneys. The opinion of a different panel, which included Judge Stephens, in the case of *Van Camp Sea Food Company v. Nordyke*, 140 F. 2d 902, is a classic and fair example of "the accepted and usual course of judicial proceedings" on all appeals adjudicated by the United

States Court of Appeals for the Ninth Circuit. Many more could be cited. In that case the judges *stated* the pleadings, the evidence, the instructions to the jury, the objections and contentions of the appellant and wrote a direct and forthright opinion, pursuant to which any ordinarily intelligent judge or attorney can clearly understand the legal issues involved and the decision of the panel or division in respect thereof.

In the case at bar, Judge Mathews, at the oral proceedings on appellant's motion to supplement and correct the Transcript of Record referred to the motion and affidavit of appellant's attorney as a "feud" with Judge Tolin. He also, according to my recollection, said: "*If you will cease this feud with Judge Tolin, a good man, you will (or may) be able to do your client more good in this case than otherwise.*" Judge Hamley was there, as one of the panel or division. If I have not stated the fact, I would like to have Judge Hamley so state in a supplement to the opinion, if this petition is denied. This is a court of record, but the clerk made no entry in the minutes showing that part of the proceedings. In spite of this implied threat, the personal integrity and impartiality of the trial judge were thereafter questioned in writing in the Appellant's Opening Brief.

Your Honors do not notice or attempt to distinguish the many authorities cited by appellant in support of its contentions as set forth in the briefs and oral argument. Why not? They are in point and support the contentions in respect of which they were cited. Vide: The cases and authorities dealing with the vital questions of artificial illumination and "in the course of the employment", for two examples.

The panel or division has adopted, as its statement of the facts in the record on appeal in the case at bar, an excerpt from the opinion of another panel or division of the court in the case of *Hutchison v. Pacific-Atlantic Steamship Co.*, 217 F. 2d 384, 385, wherein it is stated that "the men used an iron ladder adjacent to an *open* ventilator shaft." The unvarnished truth in respect of the ventilator shaft is that the iron ladder was not adjacent to the ventilator *shaft* and that the ventilator shaft was not an *open* shaft. The iron ladder was affixed to a steel plate which separated the *access* shaft, not mentioned in the opinion, from the ventilator shaft. The top of this steel plate is flush with the level of the masthouse deck. The *top* rung of the iron ladder is *below* the top of the steel plate. The ladder was affixed to the aft surface of the steel plate which made up the forward side of the access shaft and the rungs and side rails of this ladder were approximately six inches aft of said surface of said steel plate. Immediately above the top of said steel plate which separated the access shaft from the ventilator shaft there was a substantial and permanently affixed two-course pipe railing which extended from the port solid steel bulkhead of the masthouse to a stanchion located at the junction of said steel plate and the floor or deck of the masthouse and from that junction to the forward solid steel bulkhead of the masthouse. (Photographs and diagram, plaintiff's exhibits 1, 2, 3, 9, 10 and 12.)

These rails were described by *plaintiff's* witness Amundsen in the record on appeal in number 13,852 as "rails *guarding* the ventilator shaft" and "*bars* guarding the ventilator shaft". (*Hutchison v. Pacific-Atlantic Steam-*

ship Co., No. 13,852, Vol. 1, pp. 83-84.) The same evidence is in the record on appeal in number 15,091, *Pacific-Atlantic Steamship Co. v. Hutchison*. (T.R., pp. 155-156.) Plaintiff's witness Crawford testified at the last trial that the rails were "guard rails" and were "protective devices". (T. R., pp. 233, 235.)

In the opening brief for the appellant in the case of *Hutchison v. Pacific-Atlantic Steamship Co.*, No. 13,852, at p. 4, lines 12-13, her attorney said, with respect to these railings, as follows: "*Surrounding* the top of the ventilator trunk there were *two pipe railings*." Thus, a truthful statement of the fact is that there were *protective* devices consisting of guard rails surrounding the two sides of the ventilator shaft, and steel bulkheads on the other sides.

A "guard rail" is defined in Funk & Wagnalls Standard Dictionary, Medallion Edition, at p. 1086, as "a safety-rail around a hatchway or similar place." In Webster's New International Dictionary, Second Edition, p. 1111, the noun "guard", in its nautical connotation, is defined as "a fence or rail to prevent falling from the deck of a vessel"; and on the same page "guard rail" is defined as: "a railing to guard against accident or trespass" and "to protect with a guard rail."

An *open* ventilator shaft is one which is not protected or barricaded by a fence or guard rail; so that there is nothing to impede free and unobstructed ingress or egress. (Please see Dictionary definitions.)

Your Honors also adopt and therefore make the *unqualified* statement that "the ventilator shaft was *unlighted*." This is a representation by your Honors, in

the faithful and impartial performance of your respective offices as active circuit judges and a pro tempore circuit judge, that there is in the record some testimony or documentary evidence which will support an inference that, at the *precise* time when Hutchison got into the ventilator shaft, the masthouse was in a state of darkness. There is no evidence of any kind in the record to support this statement. It would be easy, if it existed, to quote the testimony or documentary evidence or to state its substance. Your Honors can not do this.

Your Honors also state as follows:

“A second trial was had before the Court and jury on the same set of facts together with some additional facts not covered in the above statement, but which do not change the case materially.”

Your Honors thus, upon your oaths to faithfully and impartially discharge the duties of your respective offices, agreeably to the Constitution and the laws of the United States, represent to the Bench and Bar, and to the Supreme Court of the United States, in the event it is called upon to determine whether it should or should not grant a petition for a writ of certiorari, as it will be, in the event this petition for a rehearing is denied, that, with the exception of some utterly immaterial additional facts, the first and second trials of this action, on the *second* cause of action, were had before the Court and the two juries “on the same set of facts” copied from the opinion on the first appeal of this case. This is not the fact.

There was no issue or contention raised by the plaintiff during the first trial of this case, in respect of the

second cause of action, that she was “attempting to recover under the cause of action for death on the theory that the death of Nathanael Patrick Hutchison was proximately caused not by the injury he received but by a failure to properly treat him between the time of receiving the injury and the time of the death” because, as stated by the Court, “Counsel *disavowed* that in the pre-trial.” (T. R., 1st Appeal, No. 13,852, p. 414.) Upon the same subject, the record on the first appeal also shows as follows:

“Q. By Mr. Simpson. On the basis of the same facts as stated in the hypothetical question, Doctor, do you have an opinion as to whether surgery could have saved the life of Nathanael Hutchison?

Mr. Gallagher. That is objected to on each and every ground heretofore stated since this witness has been on the witness stand, and particularly, on the ground it calls for surmise and conjecture without one single substantive fact to back up any such hypothesis.

The Court. I will overrule the objection, and place a Court’s objection and sustain my own objection *in that there is no issue here on that, because counsel disavowed any cause of action at the pre-trial based upon neglect of the injured man.*

Mr. Simpson. That statement by your Honor is, of course, *completely correct*, excepting the part of the *first cause of action* with respect to the fact that had a search been conducted and the man found at the time, his life might be saved, and that this failure to conduct such a search actually constituted neglect on the part of the defendant becomes significant in the light of the fact, if he could have been saved.

Mr. Gallagher. There are no allegations.

The Court. If there is a difference between what you *now* urge and what you *disavowed* I cannot see it.

Mr. Gallagher. Furthermore, if your Honor please, there are no allegations upon which a claim predicated upon the vicarious responsibility of an employer can be asserted in this case. I gave your Honor 42 Federal Second yesterday on that very point. You have to plead the negligence of the servant who is supposed to have caused or proximately contributed to the death.

The Court. *Sustained.*

Mr. Simpson. Your Honor, in connection with this point and not to belabor it because we have taken a great deal of time on these points, if I disavowed, as Your Honor says, something which included the very thing we have taken into consideration that was no intention of mine because I did not interpret it to go that far. I consider it a very important part of the case in connection with the issue before the Court; also, the second cause of action—

Mr. Gallagher. If counsel wants to amend his complaint to charge everybody on the boat with negligence I have no objection at all but I want time to get the evidence. He can have three months.

Mr. Simpson. The complaint does charge the defendant in being neglectful in that manner which embodies, naturally, that the defendant being a corporation can only act through its servants.

The Court. At the time of the pre-trial I think I stated to you I understood your case had two causes of action; one, for personal injury suffered by Nathanael Hutchison during his lifetime, and those injuries were enumerated; that is, not having a safe place to work he fell and sustained a skull fracture and so on. You left it there.

Then you had a second cause of action that Mrs. Hutchison, the widow had suffered the loss of her husband which she said deprived her of support and the expectation of support over the course of his life expectancy. Then I asked you, because I could not see what you are now urging as included in that, I asked you: *are you contending that this man lay injured at the bottom of the shaft and that there was neglect in getting him out under the circumstances where his life could have been saved if it had not been for some neglect of the employer and I understood you to say no.*

Mr. Simpson. Your Honor, with respect to the first cause of action I think that would be correct as to the allegation of conscious pain and suffering. As to the second, we have to show there is neglect in order to establish the widow is entitled to pecuniary loss and if there was negligent action which resulted in the death—or, putting it another way, if his life could have been saved there would have been no pecuniary loss.

The Court. Then I think you would have a *third* cause of action, or an expanded pleading on one of the others and you just don't have it. It is *not* included.

The objection will remain sustained.” (T. R., 1st Appeal, No. 13,852, p. 565, line 15 to p. 568, line 17.)

Testimony which was in the record on appeal on the first appeal and which is not in the record on appeal on the second appeal, is as follows:

(1) “Q. Looking at the exhibits which you have identified and which have been marked as Amundsen A and Amundsen B I'll ask you if the arrangement of guard rails appears to be the same or different than those on

other ships that you have served on? A. These are *wrong* here.” (Testimony of Amundsen, 1st Record on Appeal, No. 13,852, p. 64, line 24 to p. 65, line 4.) ..

(2) At the first trial, Kent Castle, Jr., testified in person as a witness in open Court. (T. R., 1st Appeal, No. 13,852, pp. 85-107; 218-225.) The only testimony of the witness Castle in the record on the second appeal consists of a portion of the deposition of said witness taken September 20, 1952. (T. R., 2nd Appeal, No. 15,091, pp. 217-223.) The testimony which he gave in person at the first trial and that which was read from his deposition at the second trial is not similar in substance or effect. The testimony given in person at the first trial consisted mainly of statements with reference to alleged *customs and practices* and opinions with reference to safe and unsafe *practices*. None of this is set forth in Castle’s deposition as read to the jury in the last trial.

(3) “Q. By Mr. Simpson: Were there any lights in this masthouse? A. I believe there was a built-in light but I don’t know if it works or not, because nobody ever uses it anyway. Q. Have you observed ever the built-in light you have mentioned put on in the masthouse? A. All them lockers have lights and a switch. Q. Have you ever observed whether it was on or off in that masthouse? A. I didn’t observe whether it was on or off. The individual himself turns it on if he is in there and wants to use it. And if he don’t he don’t turn it on. And he turns it off when he goes out of there. (T. R., 1st Appeal, No. 13,852, p. 239, line 13 to p. 240, line 2.) Q. Where is this cluster light that you referred to in your direct examination, Mr. Kalnin? A. There it is, right there. Q. Is it a light that

illuminates the shaft where the ladder is in the masthouse?

A. This cluster light isn't the *regular* light. The *regular* light is overhead some place. This is just a hang-in light that you switch in any place. See the rope tying it, holding it up? Q. But there is a light up above the shaft with the ladder in the masthouse?

A. Yes, right in the overhead somewhere. Supposed to be in here somewhere.

Haven't got the whole thing. Light in there somewhere—switch and everything. Q. When you say 'Light in there

somewhere, and a switch,' you are referring to the masthouse where men would go in to climb down that ladder which is in the *shaft* immediately adjacent to the ventilator shaft?

A. The light is *overhead*. Q. I am trying to

locate the place where you are talking about when you say there's a light there and switch. You are referring to the

particular part of the masthouse which encloses these two shafts, in one of which there was a ladder? A. That's

right. But the light doesn't go direct into that shaft; just gives you enough so you can see. Q. And that's a

light that can be turned on or off by a man in the event he needs to use it? A. That's right. Q. That is an

electric light? A. Yes. Switch right by the door. (T. R., 1st Appeal, No. 13,852, p. 258, line 1 to p. 259, line 9.)

Q. When a search is conducted, what parts of the ship does it cover? A. It should cover all of it, but it is not my

job to be searching for anybody. If they are not in the mess room or their room *when it is time to go to work*,

I don't worry about it—just tell the mate to get another sailor and let it go at that. (T. R., 1st Appeal, No. 13,852,

p. 260, lines 10-16.) Q. With respect to the light that you have observed—or that you testified to with respect to

Mr. Gallagher's question, in trying to locate it in the

photographs, you said that there should be a light there. Mr. Gallagher: Some place. Mr. Simpson: Pardon? Mr. Gallagher: Some place. Mr. Simpson: Yes, some place in the masthouse. Mr. Gallagher: And if you are repeating his testimony, he said, 'This picture doesn't show the entire upper surface of the masthouse,' or words to that effect. Mr. Simpson: The question is: Q. Did you ever see a light in that masthouse? A. No, I never seen it because I never used the light myself. I just know where it is at. Q. What facts do you base that upon, when you say you just know where it is? Mr. Gallagher: Object to that on the ground it is cross examination of your own witness. Mr. Simpson: No. I want information as to what he bases it upon, since he has testified already that he has never seen it in this particular masthouse. A. I know the ship so well I just didn't have to use lights. If I want something or want to go down, I just know where everything is at without bothering to look for a switch or anything. Q. In your experience, had you ever seen lights on other Victory ships there? * * * The Witness: Lights on all; they are all built the same." (T. R. 1st Appeal, No. 13,852, p. 262, line 4 to p. 263, line 15.) *None* of the foregoing testimony of Kalnin, as read from his deposition to the jury in the first trial, was admitted in evidence or read to the jury in the second trial or can be found anywhere in the Reporter's Transcript or printed Transcript of Record on the second appeal.

(4) None of the voluminous testimony given by plaintiff's witness Robert Franklin Rife, (T. R., 1st Appeal, No. 13,852, pp. 264 to p. 371, line 10), is in the present record on appeal and none of it was introduced in evi-

dence in the last trial which resulted in the judgment from which the appeal has been taken.

(5) The witness Lorcan F. Crawford, appeared in person and testified as a witness on behalf of the plaintiff, in both trials. In the first trial he gave much testimony with reference to a claimed difference between the vertical iron ladder in the access shaft located in mast-house number 2 as compared with vertical iron ladders in access shafts on other and different ships. This testimony is shown in the following places in the Transcript of Record, 1st Appeal, No. 13,852: Page 493, lines 4-7; p. 503, lines 11-16; p. 504, lines 7-11; p. 506, lines 2-14; p. 510, line 19 to p. 514, line 20. He also testified, at the first trial, with respect to having seen on one ship, the steamer Queen, in 1915, "heaving lines rigged across openings to ventilator shafts." (T. R., 1st Appeal, No. 13,852, p. 520, lines 4-16.) *None* of the foregoing testimony given by Captain Crawford during the first trial is in the record of the second trial.

The "*immaterial*" (!) additional facts not covered in the excerpt from the first opinion, include the following: (1) Amundsen and Kalnin testified that the men were working, at different times in the morning, in *different* holds of the ship. Amundsen stated that at eight o'clock in the morning he, Hutchison and some other men descended to the *bottom* number *two* hold. This was the hold immediately forward of hold number three. Kalnin testified that some of the men were working in the *shelter* deck of hold number *three*. The shelter deck is only one deck below the main deck. The deck referred to by

Amundsen was the bottom deck of a different hold. (2) Kalnin's testimony that during the four months that he was aboard the Linfield Victory the ladder in the access shaft was used by seamen and longshoremen on many, many occasions. (3) Amundsen's testimony that on the particular date in question, April 24, 1951, the particular ladder was used by Hutchison on at least three occasions without incident or accident; and by *all* of the other men working with Amundsen on more occasions than three without incident or accident; and that he, Amundsen, *saw* Hutchison walk *up the ladder* on his way to the lavatory to get a drink. (4) John Hutchison's testimony that with the door of the masthouse open or even partly opened it was easy to see everything within the masthouse as soon as one's eyes became accustomed to the difference between the bright sunlight outside and the degree of visibility inside. (5) Castle's testimony that he made an examination of the masthouse and the area surrounding it [without any artificial illumination of any kind being mentioned]; and went *up and down* the ladder *several* times and looked *down* the trunk and looked about the interior of the masthouse; and his opinion "*that with proper illumination or with the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse*". (6) The shipping articles which demonstrate, not having been signed by Nathanael Hutchison, that he was not a member of the crew on the intercoastal voyage. (7) The bareboat charter showing that the vessel was owned by the United States of America, and that the defendant was prohibited by the provisions of that contract from mak-

ing any structural changes or any changes in the appliances of the ship without the antecedent written permission of the United States of America. (8) The *verified* certificate of inspection showing that in the opinion of the duly authorized officer of the Coast Guard the vessel was in a condition to warrant belief that she could be used in navigation as a steamer, with safety to life; that all the requirements of law had been faithfully complied with and that the Coast Guard had *approved* the vessel and her *equipment* throughout. (9) Captain Dyer's testimony that the defendant had handled for the United States Government 36 or 37 Victory type vessels, 6 purchased outright by the defendant and 5 or 6 under bareboat charter; that he went aboard those ships, visited them frequently, and was present quite frequently while Coast Guard inspectors were inspecting Victory ships; that in the course of the inspections made by the Coast Guard inspectors, their inspection includes the entire vessel, all cargo spaces and masthouses; that in all of the Victory ships he had ever seen, he had not seen any which were any different from the number 2 masthouse as shown in the photographs taken of the "Linfield Victory". (10) Captain Dyer's testimony that there were 22 cargo lights on hand on the vessel on March 9, 1951, and that the licensed officers ordered an additional 4 which were delivered to the vessel before the commencement of the voyage and that in the event it is dark any place in the hold or in a masthouse a cargo light may be used for the purpose of supplying artificial illumination, which is their purpose; and that it is the right of any member of the crew to take such a light and use it

in case he desires to do so, the company having no restrictions on the use of the lights by the crew. (11) The testimony of Crawford, Dyer and Webb showing that the ventilator cowl was a hollow tube and that its smallest diameter was 36 inches without any obstruction to the passage of the luminous energy of light, excepting the screen over the outer opening and the screen across the lower opening. (12) The testimony of Wise and Webb as to adequate visibility with hatch number three *completely* covered, which was *not* the condition existing on April 24, 1951 when the aft section of hatch number three was *open*. (13) Dyer's testimony as to visibility *inside* the masthouse when the aft section of hatch number three *was* open.

All of this substantial and material evidence is set forth in "The Statement of The Case," with accuracy and proper references to the pages in the Transcript of Record, in appellant's Opening Brief, pp. 7-45.

(b) **GROUND NUMBER TWO.**

When the Supreme Court of the United States is considering and deciding a legal issue involving the sufficiency of a complaint to state facts sufficient to constitute a cause of action under a federal statute, it takes the time to set forth the actual allegations of the complaint or at least a clear statement of the substance thereof and then proceeds to show that the complaint is or is not legally sufficient. Examples of this accepted and usual course of judicial proceedings in respect of such matters are the following cases: *Brown v. Western Ry. of Alabama*,

338 U. S. 294, 100 L. ed. 100; *Wilkerson v. McCarthy*, 336 U. S. 53, 93 L. ed. 497; and *Anderson v. Atchison T. & S. Fe Ry. Co.*, 333 U. S. 821, 92 L. ed. 1108. A good example of how the Ninth Circuit has considered and decided contentions in respect of the sufficiency of a pleading, is the accepted and usual course of judicial proceedings in said Circuit, is found in the case of *Lahde v. Soc. Armadora Del Norte*, 220 F. 2d 357.

Appellant therefore contends that there has been an unreasonable and unjustified discrimination against it in the neglect or refusal of this panel or division to consider and decide the legal issues clearly raised in the opening brief, reply brief and oral argument of appellant in respect of the insufficiency of the allegations of the "Second Cause of Action" in connection with the required *jurisdictional* averments and with respect to the averments which are required in order to state facts sufficient to constitute a cause of action under the death action portion of the Jones Act and the statutes of the United States as found in the Federal Employers' Liability Act, adopted by reference thereto as an integral part of said portion of the Jones Act. This discrimination is in contravention of the due process of law provision of Amendment V, U. S. Constitution.

(c) GROUND NUMBER THREE.

All appellant can do at this point is to refer your Honors to the specification of errors as set forth in appellant's opening brief in respect of the subject matters of this ground of the petition; and the argument and au-

thorities in support thereof. By reference thereto, there is incorporated herein, all of said specifications of error and the argument and authorities in support thereof as set forth clearly in the briefs of appellant.

(d) GROUND NUMBER FOUR.

Your Honors have treated the "search for and discover" allegations of paragraph IX and the evidence in respect of that subject in a vague, indistinct and uncertain manner. Appellant again calls to your particular attention the fact that there is no allegation whatever, anywhere in the amended complaint, that the master of the vessel had the slightest knowledge, actual or constructive, in respect of the fact that Hutchison had suffered any injury or that he needed any kind of medical or hospital care or attention. If, which appellant has always disputed, this theory of liability is one within the factual bases of possible liability as set forth in Title 45 U. S. C. § 51, it would have to be based upon the particular part of the said statute which provides that the employer is liable

"in the case of the death of such employee, to his or her personal representative, . . . for such . . . death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

There is no averment anywhere in the amended complaint that the master of the vessel, or any other licensed officer of the vessel, negligently failed to provide necessary or

reasonably required medical or hospital care or attention or that as a proximate result of any such negligent failure Hutchison died or that the death of Hutchison resulted in whole or in part from any such alleged negligence. The law in respect of the proposition that the *master* of the vessel is *the* agent of the owner or employer for the purpose of providing whatever medical or hospital care is necessary in and about the treatment of an injury which is actually sustained in the service of the ship is thoroughly settled and discussed in the following cases: *The Iroquois*, 94 U. S. 240, 48 L. ed. 955; *The Troop*, 118 F. 769, 128 F. 856; *The C. S. Holmes*, 220 F. 273 and *Willey v. Alaska Packers' Assn.*, 18 F. 2d 8. No such issue was asserted in the amended complaint or mentioned in the evidence.

(e) GROUND NUMBER FIVE.

It is respectfully contended that *custom* has absolutely nothing to do with whether a complaint does or does not state facts sufficient to constitute a statutory cause of action. The sole basis upon which the sufficiency of such complaint can be logically determined is to lay the provisions of the statute on one side and the averments of the complaint on the other and determine from a comparison thereof whether the complaint contains all of the averments which are set forth as the conditions precedent to a right on the part of the plaintiff to recover damages pursuant to the provisions of such statute. The amended complaint, in respect of the Second Cause of Action, does not meet this test. Please compare it, word for word, with § 51, Title 45, U. S. C.

Appellant's contentions with respect to this subject matter have not been considered or decided; and the authorities in support of appellant's contention, including the actual language of the statute involved, have been ignored. Your Honors do not mention the Federal Employers' Liability Act or any of the decisions in respect of the sufficiency of a pleading thereunder. This particular point is particularly worthy of a distinct and direct discussion because there is no adjudicated case, in so far as appellant's attorney is aware, wherein the contentions of the appellant, *in the case at bar*, in respect of the requirements of pleading a cause of action for the death of a seaman have been considered or decided.

(f) GROUND NUMBER SIX.

The statement of this ground, *supra*, is all that is required at this point in view of the fact that the subject matter has been sufficiently brought to the attention of the Court hereinabove.

(g) GROUND NUMBER SEVEN.

In view of the proposition that appellant cited quite a few decisions and authorities holding that artificial illumination is entirely unnecessary in the absence of proof that the place of work or a passageway used in getting to or from a place of work was dark at the precise time of the happening of an accident; or that at least the evidence must show that there was such a lack of the lumi-

nous energy of natural light as to make artificial light reasonably necessary, it seems sufficient to merely call your Honors' attention to said authorities at this point. All of them have been cited either in the opening brief, the reply brief or in the printed excerpts from appellant's oral argument. They are as follows: *Smith v. Arcadia Over Seas Freighters*, 202 F. 2d 141; *Lahde v. Soc. Armadora Del Norte*, 220 F. 2d 357; *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784; 56 C. J. S., pp. 931-933; § 219 (b) (c).

(h) GROUND NUMBER EIGHT.

Procedural due process of law as guaranteed to every person by the provisions of Amendment 5, Constitution of the United States, entitled the appellant to an appropriate instruction in respect of every genuine issue of material fact submitted to the jury.

“Trial by jury as guaranteed by the Constitution of the United States and by the several States presupposes a jury under proper guidance of a disinterested and competent trial judge. *Herron v. Southern P. Co.*, 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383.” (Concurring opinion of Mr. Justice Frankfurter, in the case of *Wilkerson v. McCarthy*, 336 U. S. 53, 64, 93 L. ed. 497, 506.)

“The aim of the Amendment, [Amendment V. U. S. Constitution] as this Court has held, is to preserve the *substance* of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to

be resolved by the court and issues of fact are to be determined by the jury under *appropriate instructions* by the court.” (*Baltimore & Carolina Line, Inc., Petitioner v. Donald Redman*, 295 U. S. 654, 657, 79 L. ed. 1636, 1638.)

Pursuant to the foregoing clear enunciation of the Supreme Court of the United States, the appellant was absolutely entitled to have the jury instructed in respect of the meaning of the language “in the course of his employment” and also in respect of the subject matter of foreseeability. What the trial court stated to the jury with reference to the subject of foreseeability was not couched in language which would tell a jury of laymen anything about the real substance of this essential element of actionable negligence. What the court said about “reasonably apprehended” is not the same as telling the jury, in plain English, that no person is guilty of negligence because of a failure to take some affirmative act for the prevention of a possible accident unless in the exercise of ordinary care a person situated similarly to the position of the defendant would have anticipated, in the exercise of ordinary care, that a failure to take some step or to provide some additional safeguard would in all probability result in some kind of accident to some person required to be in the vicinity of the particular place involved.

For the failure of the trial judge to give instructions on these two subjects, the judgment should be reversed.

Grounds Number Nine, Number Ten and Number 11 sufficiently state the position and contention of the appellant for the purposes of this petition.

The authorities upon which the appellant relies in support of this petition are the same ones which were cited in its opening brief, closing brief and the printed excerpts from the oral argument.

CONCLUSION.

It is respectfully submitted that this petition for a rehearing should be granted.

Dated, April 26, 1957.

LASHER B. GALLAGHER,
*Attorney for Appellant
and Petitioner.*

I hereby certify that in my judgment the petition for a rehearing is well founded and that it is not interposed for delay.

Dated, April 26, 1957.

LASHER B. GALLAGHER,
*Attorney for Appellant
and Petitioner.*

No. 15093

United States
Court of Appeals
for the Ninth Circuit

AUTREY BROTHERS, INC., LEWIS AUTREY,
STELLA AUTREY and SLEEP E-Z MAT-
TRESS CO., a Corporation,

Appellant,

vs.

FRANK M. CHICHESTER, as Trustee in Bank-
ruptcy for the Estate of Veraco, Inc., Doing
Business as Airst Mattress Co., Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILE

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States,
Southern District of California, Central Division

Civil No. 17354-WB

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Airst Mattress Co., Bankrupt,
Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY
and STELLA AUTREY,
Defendants.

COMPLAINT

(Suit by Trustee to Avoid Fraudulent Conveyances. Bankruptcy Act, Sections 67-e and 70-e; Civil Code of California, Sec. 3440; Oregon Rev. Stat. Sec. 79.010, et seq.; Remington's Rev. Code of Wash. Sec. 5832, et seq., Utah Code-Title 25-2-1, et seq.)

The plaintiff for his first cause of action, complains of the defendants and alleges:

I.

That at all times hereinafter mentioned, Veraco, Inc., which will hereinafter be sometimes referred to as the "bankrupt," was, since has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in Los Angeles County, State of California, and elsewhere, as Veraco, Inc., also doing business as Airst Mattress Co.

II.

That at all times hereinafter mentioned, the defendant Autrey Brothers, Inc., was, since has been and still is a [10*] corporation organized and existing under and by virtue of the laws of the State of California, and that substantially all, if not all, of the capital stock of Autrey Brothers, Inc., was and is owned and controlled by the defendants Lewis Autrey and Stella Autrey, who at all times hereinafter mentioned were and now are husband and wife, and are also, so plaintiff believes and therefore alleges the fact to be, officers and directors of said defendant Autrey Brothers, Inc.

III.

That this is an action brought by the plaintiff under the provisions of Sections 67-d and 67-e and Section 70-e of the National Bankruptcy Act and the Bulk Sales Laws of California, Oregon, Washington and Utah, as hereinafter set forth in this and subsequent causes of action, for the purpose of avoiding fraudulent and void transfers by the bankrupt, Veraco, Inc. to Autrey Brothers, Inc. and the defendants Lewis Autrey and Stella Autrey, and to recover the value of stocks in trade so fraudulently transferred by said bankrupt Veraco, Inc., to the defendants herein and to Autrey Brothers, Inc., the corporation owned and controlled by them.

IV.

That on November 9, 1953, and for a long time

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

prior thereto, the bankrupt Veraco, Inc., was engaged as a retail merchant selling mattresses and other bedding equipment at retail at certain stores located at No. 2039 W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California, and 11950 E. Garvey Boulevard, El Monte, California, and was purchasing, selling and and dealing with said merchandise on credit.

V.

That on November 9, 1953, the bankrupt Veraco, Inc., transferred to the defendants Lewis Autrey and Autrey Brothers, [11] Inc., the entire stock, fixtures, equipment and trucks belonging to the retail stores owned and operated by said bankrupt, Veraco, Inc., situated at No. 2039 W. Pico Boulevard, Los Angeles, California, 17,113 Bellflower Boulevard, Bellflower, California, and 11,950 E. Garvey Boulevard, El Monte, California; that neither the bankrupt Veraco, Inc., nor the defendants Lewis Autrey or Autrey Brothers, Inc., or either or any of them, or any of the officers or directors of the defendant Autrey Brothers, Inc., caused to be recorded in the office of the County Recorder of Los Angeles County, California, where its said stocks were situated, at least ten days prior to the date of said transfers, a notice of intention to transfer said stocks in trade in bulk or otherwise than in the ordinary course of trade and the regular and usual practice and method of business of the transferor, Veraco, Inc., nor was any such notice

ever published in a newspaper of general circulation published in the township in which such transfer was intended to be made and where such stocks in trade were located, containing a general statement of the character of the merchandise or property intended to be transferred, the date when and the place where the purchase price or consideration was to be paid, the name and address of the intended vendor, transferor or assignor, and the name and address of the intended vendee, transferee or assignee, as required under the provisions of Section 3440 of the Civil Code of California.

VI.

That at the time of said transfer the bankrupt, Veraco, Inc., was indebted to numerous and divers creditors whose claims remain due, owing and unpaid, and constitute liabilities of Veraco, Inc. in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a [12] creditor of the bankrupt on open account as of the date of said transfer in the sum of \$704.76, and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of \$2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VII.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants was the sum of \$20,346.03.

VIII.

That as to creditors existing against the bankrupt on November 9, 1953, said transfer of said stocks in trade, fixtures and equipment was fraudulent and void, and is fraudulent and void as against the plaintiff herein.

IX.

That on August 10, 1954, Veraco, Inc., doing business as Airst Mattress Co., filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of California, Central Division. praying that it be adjudged a bankrupt within the purview of Section 4, Subd. (a) of the National Bankruptcy Act, and on the same date, August 10, 1954, it was adjudicated a bankrupt; that at the First Meeting of creditors had and held on August 30, 1954, the plaintiff herein was elected Trustee in bankruptcy by creditors of said bankrupt, filed his bond and qualified, and at all times since August 30, 1954, plaintiff was, since has been and now is the duly elected, qualified and acting Trustee in bankruptcy for the estate of Veraco, Inc.

And for His Second Cause of Action Against the Defendants, Plaintiff complains and [13] alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Paragraphs I, II, III and IX of the plaintiff's first

cause of action and makes them a part hereof by reference.

II.

That on November 5, 1953, and for a long time prior thereto, the bankrupt, Veraco, Inc. was engaged as a retail merchant selling mattresses and other bedding equipment at retail at a certain store located at No. 850 South Main Street, Salt Lake City, Utah, and was purchasing and dealing with said merchandise on credit.

III.

That on November 5, 1953, the Bulk Sales Law of the State of Utah, being known as Title 25, Chapter 2, Sections 1, 2, 3 and 4 read as set forth in Exhibit "A" hereto attached and made a part hereof by reference the same as though the statute was set forth in this paragraph.

IV.

That on or about November 5, 1953, the bankrupt, Veraco, Inc., at Beverly Hills, California, transferred the entire stock of merchandise situated in the stores described in the preceding paragraphs in Salt Lake City, Utah, together with the fixtures and equipment therein contained; that the defendants nor none of them demanded of or received from the bankrupt a certain statement in writing as set forth in Title 25, Chap. 2, Sec. 1 of said Utah Bulk Sales Law, containing the names and addresses of all of the creditors of the bankrupt, Veraco, Inc., together with the amount of the indebtedness due

or owing by said seller or transferor, Veraco, Inc., to each of such creditors, nor was such a sworn statement furnished by the seller, Veraco, Inc. at least five (5) days previous to said transfer or at all, [14] nor did the bankrupt, Veraco, Inc., or the defendants herein or any of them, at least five (5) days prior to the transfer in bulk of said stock and fixtures, which transfer was not made in the ordinary and regular course of business of Veraco, Inc., notify personally or by registered mail every creditor as shown upon such verified statement of the proposed sale or transfer, with the price thereof, the name of the person to whom such sale or transfer was to be made, and the time and conditions of payment, nor did they or any of them cause any purchase money or consideration for said property to be applied ratably, except as to the priorities provided by law of the State of Utah, to the payment of bona fide claims of creditors of the seller as shown upon such verified statement.

V.

That at the time of said transfer of said merchandise and fixtures in bulk, the bankrupt, Veraco, Inc. was indebted to numerous and divers creditors whose claims remain unpaid and constitute liabilities of Veraco, Inc. in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as of the date of said transfer in the sum of \$704.76, and on which open account there remained due, owing

and unpaid at the date of bankruptcy of Veraco, Inc., the sum of \$2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VI.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned and controlled by the defendants herein was the sum of \$15,395.36. [15]

VII.

That the defendants, nor none of them, paid existing creditors of the bankrupt, Veraco, Inc., their proportionate share of the full purchase price of said stock in trade and fixtures, nor was any waiver of notice produced by the bankrupt, Veraco, Inc. in writing, waiving the provisions of Chapter 2 of the Utah Code Ann., as provided in Section 4 of Chapter 2 of Title 25, and as to existing creditors of said bankrupt vendor, said sale was fraudulent and void and is fraudulent and void as to plaintiff herein.

And for a Third Cause of Action Against the Defendant, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Para-

graphs I, II, III and IX of plaintiff's first cause of action and makes them a part hereof by reference.

II.

That on November 16, 1953, and for a long time prior thereto, the bankrupt, Veraco, Inc., was engaged as a retail merchant selling mattresses and other bedding equipment at retail at a certain store located at No. 2800 N. E. Sandy Boulevard, Portland, Oregon, and was purchasing and dealing with said merchandise on credit.

III.

That on or about November 16, 1953, the bankrupt, Veraco, Inc., at Beverly Hills, California, transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned, controlled, operated and directed by the defendants herein, all of the stock, fixtures, and equipment belonging to said retail store not in the ordinary course of trade of the [16] business or trade of Veraco, Inc. but in bulk, without complying with the terms of the Oregon Bulk Sales Law, namely, Chapter 79.010, Oregon Revised Statutes, Chapter 70.020, 79.030 and 79.040 of said Bulk Sales Law of Oregon, a full, true and correct copy of which is hereto attached and set forth as Exhibit "B," the same as though said statute were set forth in this paragraph.

IV.

That none of the defendants named herein demanded or received from the bankrupt vendor,

Veraco, Inc., or from a managing officer or agent thereof, at least five (5) days before the consummation of such purchase or transfer or prior to making any payment to said bankrupt, Veraco, Inc., of more than 10% of the sale price, a written statement under oath containing the names and addresses of all of the creditors of the vendor, Veraco, Inc., together with the amount of indebtedness due or owing or to become due or owing by the vendor, Veraco, Inc., to each of such creditors, or a written statement under oath that there were no creditors of said vendor, Veraco, Inc., now a bankrupt, nor did Veraco, Inc., furnish any such statement to the defendants herein, or any of them, at least five (5) days before the consummation of such sale or transfer, nor did the defendants or any of them, at least five (5) days before the consummation of such sale or transfer of such stock in trade in bulk, notify or cause to be notified personally, by wire or registered mail, each of the creditors of the vendor named in any statement of the proposed purchase or transfer of said stock in trade and fixtures.

V.

That at the time of said transfer by the bankrupt to the defendants herein, the bankrupt, Veraco, Inc., was indebted to numerous and divers creditors whose claims remain owing and [17] unpaid and constitute liabilities of Veraco, Inc., in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as

of the date of said transfer in the sum of \$704.76, and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of \$2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VI.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned, controlled and directed by the defendants, was the sum of \$21,846.68.

VII.

That as to creditors existing against said bankrupt Veraco, Inc., on November 16, 1953, said transfer of said stock in trade, fixtures and equipment was fraudulent and void and is fraudulent and void as against the plaintiff herein.

And for a Fourth Cause of Action Against the Defendants, the Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Paragraphs I, II, III and IX of plaintiff's first cause of action, and makes them a part hereof by reference.

II.

That on November 16, 1953, and for a long time prior thereto, the bankrupt Veraco, Inc., was en-

gaged as a retail merchant selling merchandise and other bedding equipment at retail at certain stores located at No. 5311 South Tacoma Way, City of [18] Tacoma, County of Pierce, and State of Washington, and at No. 7808 Aurora Boulevard, in the City of Seattle, County of King, in the State of Washington, and was purchasing and dealing with said merchandise on credit.

III.

That on or about November 16, 1953, the bankrupt Veraco, Inc., at Beverly Hills, California, transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned and controlled, operated and directed by the defendants herein, all of the stock in trade, fixtures and equipment belonging to both of said retail stores so situated in Seattle and Tacoma, Washington, valued at \$18,727.55 which said transfer was not made in the regular and during the course of business of the bankrupt Veraco, Inc., but was made in bulk; that on November 16, 1953, when said transfer was made, the Bulk Sales Law of the State of Washington known as Title 37, Chapter 2, Sections 5832, 5833, 5834 and 5835 of Remington's Revised Statutes of Washington, as set forth in Exhibit "C" hereto attached and made a part hereof the same as though said Bulk Sales Law were set forth in this paragraph.

IV.

That the bankrupt and the defendants herein failed and neglected to observe the provisions of

Chapter 2, Sections 5832 to 5835, inclusive, of Remington's Revised Statutes of Washington, in the following respects, namely: That before the consummation of said transfers, or before paying to the vendor or its agent or representative, or the giving of any promissory note or other evidence of indebtedness therefor, the defendants herein did not demand of and receive from the vendor, Veraco, Inc., or its agent, or from its president, vice president, secretary, treasurer or managing agent of such corporation, a statement in writing sworn to, giving the names and addresses of all of the creditors of the vendor, Veraco, Inc., to which [19] Veraco, Inc., was indebted for or on account of any goods, wares and merchandise or fixtures and equipment used in and about the business of said vendor, Veraco, Inc., purchased on credit, or for or on account of money borrowed to carry on the business of the vendor of which the goods, wares and merchandise and/or fixtures and equipment bargained for or purchased or transferred were a part, together with the amount of indebtedness due and owing and to become due and owing by the vendor, Veraco, Inc., to each of such creditors, nor did the vendor, Veraco, Inc., or its agent or officers furnish any such statement as required under Section 5832 of the Washington Bulk Sales Law hereinbefore set forth, verified under oath, nor did the defendants or any of them file one of such statements in the office of the County Auditors of Pierce County, Washington or King County, Washington, or either of said County Audi-

tors in which counties the stock and/or fixtures proposed to be purchased or transferred were situated at least five (5) days before the consummation of said purchase or transfers, and caused the same to be indexed as chattel mortgages are indexed the name of the vendor being indexed as mortgagor, and the name of the intended purchaser or transferee as mortgagagee, nor did the defendants, or any of them, cause to be applied such purchase price pro rata to the payment of bona fide claims of the creditors of the vendor, Veraco, Inc., now a bankrupt, as shown upon said verified statement in the office of the County Auditor, filed at least five (5) days before the consummation or purchase as provided in Section 5832 of the Washington Bulk Sales Act, and as a result thereof said sale or transfer was fraudulent and void as to creditors of the vendor, Veraco, Inc., and is null and void as to the plaintiff herein as Trustee in bankruptcy for the estate of Veraco, Inc., bankrupt. [20]

V.

That at the time of said transfers from the bankrupt to the defendants herein, the bankrupt Veraco, Inc., was indebted to numerous and divers creditors whose names remain due, owing and unpaid and constitute liabilities of Veraco, Inc., in its bankruptcy proceeding, among whom are the following, namely:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as of the date of said transfer in the sum of \$704.76,

and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of \$2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

And for a Fifth Cause of Action Against the Defendants, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in the entirety of the plaintiff's first, second, third and fourth cause of action, and makes them a part hereof by reference.

II.

That after the transfers complained of in the plaintiff's first, second, third and fourth causes of action, the defendants herein took possession of and operated the places of business set forth in said first four causes of action, including contingent reserves on conditional sales contracts in the possession of Personal Finance Co., belonging to the bankrupt corporation and accounts receivable held by it, in an unknown amount, which accounts receivable have since been collected by defendants herein, and made, so plaintiff is informed and believes and therefore alleges the fact to be, substantial [21] profits from the operation of said retail places of business in an amount unknown to the plaintiff herein, and the amount of which said profits can

only be ascertained by an accounting between the plaintiff and the defendants herein.

III.

That as a result of the transfers complained of by the plaintiff in his first four causes of action herein, the bankrupt Veraco, Inc., was rendered hopelessly insolvent, is insolvent, and the recovery and collection of a judgment against the defendants herein for the actual physical value of the stock in trade and fixtures transferred to the defendants herein, as described in the plaintiff's first four causes of action herein, will not be sufficient to pay the unpaid indebtedness of the bankrupt, Veraco, Inc., after payment of the expenses of administration incurred in its bankruptcy proceeding; that an accounting of profits made by the defendants out of said stores and the stock and fixtures thereof so transferred by the bankrupt Veraco, Inc., to the defendants herein is necessary and judgment should be rendered against the defendants herein in favor of the plaintiff for the amount of such profits so realized and appropriated by the defendants herein.

And for a Sixth Cause of Action Against the Defendants, and Particularly Against the Defendant Lewis Autrey, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge made in his first,

second, third and fourth causes of action, and makes them a part hereof by reference.

II.

That on November 5, 1953, and November 16, 1953, the [22] defendant Lewis Autrey was an officer and director not only of the defendant Autrey Brothers, Inc., but was also an officer and director of the bankrupt corporation, Veraco, Inc., doing business as the Airst Mattress Co., now a bankrupt.

III.

That on or about November 5, 1953, the defendant Lewis Autrey, while an officer and director of said bankrupt corporation, Veraco, Inc., and was authorized to sign and draw checks on its bank account, and within one year prior to the filing of the petition in bankruptcy of Veraco, Inc., caused the transfers complained of in the plaintiff's first four causes of action herein to be made by the bankrupt involuntarily and without legal proceedings, by the means and in the manner as hereinafter specifically set forth.

IV.

That the bankrupt, Veraco, Inc. was the sales outlet for the defendant Autrey Brothers, Inc. and it was contemplated during the operations of Veraco, Inc., that it would sell merchandise manufactured by the defendant Autrey Brothers, Inc., as a retail outlet, and that said sales made at retail were not to be made at a substantial profit accruing to the bankrupt, Veraco, Inc., but that the profits derived from said retail sales would be accrued for the benefit of the

defendant Autrey Brothers, Inc. and shared equally between the defendants Lewis Autrey and Autrey Brothers, Inc. on the one hand, and Veraco, Inc., now a bankrupt, and Vernon W. Autrey, who owned and controlled 50% of the capital stock of the bankrupt, Veraco, Inc.

V.

That on November 5, 1953, the defendant Lewis Autrey charged Vernon W. Autrey, an officer and director of Veraco, Inc., with misappropriating or diverting the sum of \$95,000.00 claimed by the said Lewis Autrey to be due the defendants Autrey Brothers, [23] Inc. and Lewis Autrey from the bankrupt, Veraco, Inc. and Vernon W. Autrey, and threatened that unless Vernon W. Autrey and Veraco, Inc., the bankrupt, transferred and delivered over to the defendants Autrey Brothers, Inc. and Lewis B. Autrey, the retail outlets, the transfers of which are complained of in the plaintiff's first four causes of action herein, he, the said Lewis B. Autrey and Autrey Brothers, Inc. would cause Vernon Autrey and Veraco, Inc., now a bankrupt, to be criminally prosecuted for embezzlement or misappropriation of funds belonging to the defendants Lewis Autrey and Autrey Brothers, Inc.

VI.

That on November 5, 1953, acting under menace, duress and intimidation on the part of the defendant Lewis Autrey, and believing that the defendant Lewis Autrey would cause him, the said Vernon W. Autrey, to be arrested and criminally prosecuted

on a charge of misappropriation and embezzlement, and without knowledge of the true facts as to whether or not he, the said Vernon W. Autrey, or the bankrupt, Veraco, Inc., had diverted more than their share of the profits from the sale of merchandise through said retail outlets operated by Veraco, Inc., the said Vernon W. Autrey, on behalf of the bankrupt Veraco, Inc., was coerced by defendants into signing agreements in writing under date of November 5, 1953, and November 16, 1953, whereby the various retail outlets described in the plaintiff's first four causes of action were transferred by the bankrupt, Veraco, Inc. and Vernon W. Autrey to the defendants Autrey Brothers, Inc., and Lewis Autrey.

VII.

That said charges made by the defendant Lewis Autrey against Vernon W. Autrey and Veraco, Inc. were false and untrue; that in truth and in fact there was actually due, owing and unpaid from Autrey Brothers, Inc. and Lewis Autrey, the defendants [24] herein, to Veraco, Inc., the bankrupt, and to Vernon W. Autrey, the sum of \$52,111.69; that said charge that the bankrupt, Veraco, Inc. and Vernon W. Autrey had misappropriated or embezzled the sum of \$95,000.00 belonging to the defendants herein was without foundation in fact and was made only for the purpose of humiliating, coercing and intimidating the bankrupt and Vernon W. Autrey into making the conveyances complained of in the first four causes of action herein.

VIII.

That said transfers and each of them were made to the defendants without a fair consideration and resulted in the bankrupt, Veraco, Inc., being rendered insolvent and unable to pay its debts, and left said bankrupt engaged in a retail business for which the property remaining in its hands constituted an unreasonably small capital and was not accepted by the defendants herein, or any of them, in good faith, but on the contrary the property so extorted by the defendants herein from the bankrupt, Veraco, Inc., was involuntarily extorted by the defendants Lewis Autrey and Autrey Brothers, Inc. with the intent and purpose on their part that the creditors, both existing and future, of Veraco, Inc. should be hindered, delayed or defrauded in the collection of their debts.

IX.

That at the time of the obtaining of said agreements of November 5, 1953, and November 16, 1953, as hereinbefore described, the bankrupt Veraco, Inc. was indebted to the Times-Mirror Company on open account in the amount of \$704.76, and at the date of bankruptcy was indebted to said Times-Mirror Company on open account in the sum of \$2,465.87, and became indebted subsequently to November 5, 1953, and November 16, 1953, to numerous other and divers creditors who are creditors in the bankruptcy proceeding of Veraco, Inc. in a sum in excess of \$100,000. [25]

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. On the first cause of action for the sum of \$20,346.03, together with interest on said sum from November 5, 1953, at 7% per annum.

2. On the second cause of action for the sum of \$15,395.36, with interest on said sum from November 5, 1953, at 7% per annum.

3. On the third cause of action for the sum of \$21,846.68, together with interest on said sum from November 16, 1953, at 7% per annum.

4. On the fourth cause of action for the sum of \$18,727.55 at the rate of 7% per annum from November 16, 1953, at the rate of 7% per annum.

5. On the fifth cause of action, that in the event judgment is rendered in favor of the plaintiff, an accounting be had between the plaintiff and defendants herein, and a Master be appointed to take such account and ascertain the amount due plaintiff from the defendants herein under such accounting, and that the plaintiff have and recover judgment against the defendants for the amount of such accounting.

6. On the sixth cause of action, for judgment against the defendants for the sum of \$76,315.62, together with interest on said sum from November 16, 1953, at 7% per annum.

7. That the plaintiff have and recover all of his costs and disbursements herein, and be given

such other and further relief as the Court may deem just and equitable in the premises.

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN.

BUCHALTER, NEMER &
FIELDS,

By /s/ MURRAY M. FIELDS,

Attorneys for Plaintiff. [26]

EXHIBIT A

The Bulk Sales Law of the State of Utah, Title 25, Chap. 2, Sections 1, 2, 3 and 4, reads as follows: "Sale of Merchandise in Bulk.

"25-2-1. Purchaser must demand list of creditors.—It shall be the duty of every person who shall bargain for or purchase any portion of a stock of goods, wares or merchandise in bulk otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or any portion of the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business, otherwise than in the regular course of trade, before paying to the seller any part of the purchase price thereof, or delivering any promissory note or other

evidence of indebtedness therefor, to demand of and receive from such seller a sworn statement in writing, substantially as hereinafter provided, of the names and addresses of all the creditors of the seller, together with the amount of the indebtedness due or owing by the seller to each of his creditors, and it shall be the duty of the seller to furnish such statement, which shall be verified by oath to substantially the following effect:

“State of Utah,

“County of

“Before me personally appeared (seller or agent, as the case may be) who being by me first duly sworn, on his oath, did depose and say that the foregoing statement contains the names of all the creditors of (name of seller), together with their addresses, and that the amount set opposite their respective names is the amount now due and owing or which will become due and owing by (seller) to such creditors, [27] and that there are no creditors holding claims due or which will become due for or on account of goods, wares or merchandise purchased upon credit, or for the purchase price due and owing by (seller) to such creditors, or for the purchase price of fixtures or equipment, or for services performed, or on account of money borrowed to carry on the business to which said goods, fixtures, equipment or supplies appertain, other than as set forth in said statement and in this affidavit, that are within the knowledge of affiant.

“Subscribed and sworn to before me this .. day of, 19...

“25-2-2. Creditors to be notified.—Whenever any person shall bargain for or purchase any portion of a stock of merchandise in bulk otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller’s business, or an entire stock of merchandise in bulk, or the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business used in carrying on such business, otherwise than in the regular course of trade, and shall pay any part of the price, or deliver to the seller thereof, or to any person for his use, any promissory note or other evidence of indebtedness, or receive credit, whether or not evidenced by a promissory note or other evidence of indebtedness, for the purchase price or any part thereof, without at least five days previously thereto having demanded of and received from the seller the statement provided for in section 25-2-1, verified as therein provided, and without notifying at least five days previously thereto, personally or by registered mail, every creditor as shown upon such verified [28] statement of the proposed sale or transfer, with the price thereof, the name of the person to whom such sale or transfer is to be made, and the time and conditions of payment, and without causing the purchase money for such property to be applied ratably, except as to priorities provided by law, to the payment of the bona fide claims of creditors of the seller as

shown upon such verified statement, such sale or transfer shall be fraudulent and void unless the buyer shall pay the creditors of the seller as herein provided their proportionate share of the full purchase price.

“25-2-3. False statement deemed perjury.—Any seller of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller’s business, or an entire stock of merchandise in bulk, or the property, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business, and any person acting for or on behalf of any such seller, who shall knowingly or willfully make or deliver or cause to be made or delivered a statement as provided for in section 25-2-1 that shall not include the names of all of the creditors of such seller, with the correct amount due and to become due to each of them, or which shall contain any false statement, shall be deemed guilty of perjury.

“25-2-4. What is deemed a sale—Waiver by creditors.—If any person sells any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller’s business, or an entire stock of merchandise in bulk, or the property, fixtures, equipment or supplies of a hotel, restaurant, [29] barber shop or other business, used in carrying on said business, or whenever an interest in or to the

business or trade of the seller is sold or conveyed or attempted to be sold or conveyed, such shall be deemed a sale and transfer in contemplation of this chapter; provided, that if such seller produces and delivers a written waiver of the provisions of this chapter from at least a majority in number and amount of his creditors as shown by such verified statement, then and in that case the provisions of this chapter shall not apply.

“25-2-5. Certain sales excepted from chapter.— Nothing contained in this chapter shall apply to sales or transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or any public officer under judicial process.” [30]

EXHIBIT B

The Bulk Sales Law of the State of Oregon, Oregon Revised Statutes, Chapters 79.010, 79.020, 79.030 and 79.040, reads as follows:

“79.010.

“Duties of buyer and seller in bulk sales. Every person who bargains for, or purchases for cash or on credit, the goods, wares and merchandise in bulk of any commercial business or establishment, including restaurants and other food dispensing establishments, or substantially all the furniture, fixtures, supplies or equipment of any such business

or establishment, including motor vehicles, shall demand and receive from the vendor thereof, or if the vendor is a corporation from a managing officer or agent thereof, at least five days before the consummation of such purchase and prior to making payment to the vendor of more than 10 per cent of the sale price, a written statement under oath containing the names and addresses of all the creditors of the vendor, together with the amount of indebtedness due or owing, or to become due or owing, by the vendor to each of such creditors, and if there is no creditor, a written statement under oath to that effect. The vendor shall furnish such statement at least five days before the consummation of any such sale.

“79.020. Necessity of notice by buyer to creditors of seller. After receiving from the vendor the written statement mentioned in ORS 79.010, the vendee shall at least five days before the consummation of such sale notify or cause to be notified personally, by wire or by registered letter, each of the creditors of the vendor named in the statement, of the proposed purchase. Whenever any person purchases such personal property or business without notifying or causing to be notified all the creditors of the vendor named in such statement, such purchase, sale or [31] transfer as to any creditor of the vendor not so notified is conclusively presumed fraudulent and void.

“79.030. False statement or omission of creditor's name in statement. Any vendor of such per-

sonal property or business who knowingly makes or delivers, or causes to be made or delivered, any statement which is false or of which any material portion is false, or who fails to include the names of all his creditors in the statement required by ORS 79.010, shall be deemed guilty of perjury, and upon conviction thereof shall be punished accordingly.

“79.040. Transactions covered by this chapter. Any sale of such personal property or business which is out of the usual course of the business or trade of the vendor, or by which substantially the entire business or trade theretofore conducted by the vendor is sold or conveyed, or attempted to be sold or conveyed, to any person is a sale or transfer in bulk within the meaning of this chapter; but nothing in this chapter applies to sales by executors, administrators, receivers or any public officer acting under judicial process.” [32]

EXHIBIT C

The Bulk Sales Law of the State of Washington, known as Title 37, Chapter 2, Sections 5832, 5833, 5834 and 5835, of Remington's Revised Statutes of Washington, reads as follows:

“5832. Vendor to give list of creditors—Affidavit—Copy of statement—Filing. It shall be the duty of every person who shall bargain for or purchase all or substantially all of any stock of goods, wares or

merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor, in bulk, for cash or on credit, before paying the vendor, or his agent or representative, or delivering to the vendor, or his agent, any of the purchase price thereof, or any promissory note or other evidence of indebtedness therefor, to demand of and receive from such vendor, or his agent, or, if the vendor or agent be a corporation, then from the president, vice-president, secretary, treasurer or managing agent of such corporation, a statement in writing, sworn to substantially as hereinafter provided, giving the names and addresses of all of the creditors of the vendor, to whom the vendor may be indebted, for or on account of any goods, wares or merchandise, and/or fixtures and equipment, used in and about the business of the vendor, purchased upon credit, or for or on account of money borrowed to carry on the business of the vendor, of which the goods, wares and merchandise, and/or fixtures and equipment, bargained for or purchased, are a part, together with the amount of indebtedness due and owing and to become due and owing, by the vendor, to each of said creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified under oath, to the following [33] effect:

“State of Washington,

“County of—ss.

“....., being first duly sworn, on oath says, I am the vendor (or the agent of, the

vendor, of the officer, naming him, of the corpora-
 tion vendor, as the case may be) of that certain
 stock of goods, wares and merchandise, and/or fix-
 tures and equipment, situated at No. ,
 Street, in the City (or town) of ,
 county of , State of Washington, this
 day bargained to be sold to , the vendee;
 that the foregoing statement contains the names
 of all of the creditors of said , the
 vendor, to whom the vendor is indebted, for or on
 account of any goods, wares or merchandise, and/or
 fixtures and equipment, used in and about the busi-
 ness of the vendor, purchased upon credit, or for or
 on account of money borrowed to carry on the busi-
 ness of the vendor, of which the goods, wares and
 merchandise, and/or fixtures and equipment, bar-
 gained for or purchased, are a part, together with
 their addresses, and that the amounts set opposite
 the names of said creditors are the correct amounts
 now due and owing and which shall become due and
 owing by said , the vendor, to such
 creditors respectively; that there are no creditors
 holding claims for or on account of any goods, wares
 or merchandise, and/or fixtures and equipment, so
 purchased upon credit, or for or on account of
 money so borrowed, to carry on the business of the
 vendor, due or to become due from said vendor,
 other than as set forth in said statement; and that
 the matters set forth in said statement and in this
 affidavit are within my personal knowledge.

“ [34]

“Subscribed and sworn to before me this
day of, 19...

“.....,

“Title of Officer Taking Oath.

“The verified statements above provided for shall be made in duplicate and the vendee shall file one of such statements in the office of the county auditor of the county in which the stock and/or fixtures proposed to be purchased are situated, at least five days before the consummation of such purchase and the same shall be indexed as chattel mortgagers are indexed, the name of the vendor being indexed as mortgagor and the name of the intending purchaser as mortgagee.

“Sec. 5833. Part payment of purchase price—Application to creditors’ claims—Failure to file—Written waiver by creditors. Whenever any person shall bargain for, or purchase, all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of the vendor, in bulk, for cash or credit, and shall pay any part of the purchase price, or execute, or deliver to the vendor thereof, or to his order, or to any person for his use, and promissory note or other evidence of indebtedness for said purchase price, or any part thereof, without first having demanded and received from said vendor or from his agent, the statement provided for in section 5832, verified as therein provided, and without applying or causing to be applied such purchase price pro rata to the

payment of the bona fide claims of the creditors of the vendor as shown upon such verified statement, and without filing the verified statement in the office of the county auditor at least five days [35] before the consummation of the purchase as provided in the preceding section, such sale, or transfer, shall be fraudulent and void as to creditors of the vendor, of the character specified in section 5832: Provided, that if such vendor produces and delivers a written waiver of the provisions of this act, from his creditors, as shown by such verified statements, then, in that case, the provisions of this section shall not apply.

“Sec. 5834. False statement as to creditors—Liabilities in perjury. Any vendor of all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of the vendor, sold or transferred in bulk, or any other person who is acting for or in behalf of such vendor, who shall knowingly or willfully make or deliver, or cause to be made or delivered, a statement as provided for in section 5832, which shall not include the names of all of the creditors of such vendor, of the character specified in section 5832, together with their addresses, and the correct amounts due, and to become due each of them respectively, or which shall contain any false statement, shall be deemed guilty of perjury.

“Sec. 5835. Sale and transfer in bulk defined—Judicial sales excepted. Any sale, exchange or trans-

fer, or attempted exchange or transfer, of all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of a vendor engaged in the business of buying and selling and dealing in goods, wares or merchandise, of any kind or description, made out of the usual and ordinary course of business of [36] the vendor, or the sale, exchange or transfer, or attempted sale, exchange or transfer of substantially the entire business of buying, selling and dealing in goods, wares or merchandise conducted by the vendor, or the sale, exchange or transfer, or attempted sale, exchange or transfer, of the interest of the vendor in any such business, shall be deemed a sale and transfer in bulk, in contemplation of this act: Provided, that nothing contained in this act shall apply to sales or transfers of property by executors, administrators, receivers, or public officers, acting under judicial process.

“Sec. 5836. Act not to apply to executors, etc. Re-enacted as part of Sec. 5835, *supra*.”

Duly verified.

[Endorsed]: Filed October 18, 1954. [37]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND COUNTERCLAIM

In answer to the First Cause of Action of plaintiff's complaint, defendants admit, deny and allege as follows:

I.

Referring to Paragraph II of plaintiff's first cause of action, defendants admit that Autrey Brothers, Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of California; that substantially all of the capital stock of Autrey Brothers, Inc., was owned and controlled by the defendants Lewis Autrey and Stella Autrey, but allege that said capital stock is no longer owned and controlled by the defendants Lewis Autrey and Stella Autrey; that Lewis Autrey and Stella Autrey are husband and wife; except as expressly admitted defendants deny each and every allegation therein [39] contained.

II.

Referring to Paragraph III of plaintiff's first cause of action, defendants admit that this action is brought by plaintiff under the provisions of Section 67 (d), 67 (e) and 70 (e) of the National Bankruptcy Act and the Bulk Sales Laws of the States of California, Oregon, Washington and Utah, and the purpose thereof; except as expressly admitted, defendants deny generally and specifically each and every allegation contained in said paragraph.

III.

Referring to Paragraph IV of plaintiff's first cause of action defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

IV.

Referring to Paragraph IV of plaintiff's first cause of action defendants deny that the stock in trade belonging to the retail stores mentioned in said paragraph was owned by Veraco, Inc.; defendants deny that the transfer complained of was not in the regular course of business, but allege that said transfers was in fact made in the ordinary and regular course of business; that defendants further deny that said transfer required compliance with Section 3440 of the Civil Code of California; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

V.

Referring to Paragraph VI of plaintiff's first cause of action defendants have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

VI.

Referring to Paragraph VII of plaintiff's first cause of action defendants deny generally and specifically each and every [40] allegation therein contained and the whole thereof.

VII.

Referring to Paragraph VIII of plaintiff's first cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VIII.

Referring to Paragraph IX of plaintiff's first cause of action defendants admit each and every allegation therein contained except that they deny that the plaintiff herein is the duly elected, qualified and acting Trustee in Bankruptcy for the Estate of Veraco, Inc.

Answering Plaintiff's Second Cause of Action
Herein Defendants Admit, Deny and Allege as
Follows:

I.

Referring to Paragraph I of plaintiff's second cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered Paragraphs I, II, III, and IX of plaintiff's first cause of action, as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's second cause of action defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph IV of plaintiff's second cause of action defendants deny that the transfer

complained of was not made in the ordinary and regular course of business, but allege that said transfer was in fact made in the ordinary and regular course of business; except as expressly denied, defendants admit each and every allegation therein contained. [41]

IV.

Referring to Paragraph V of plaintiff's second cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

V.

Referring to Paragraph VI of plaintiff's second cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VII of plaintiff's second cause of action defendants admit all of said paragraph except that defendants deny said transfer was fraudulent and void or is fraudulent and void as to plaintiff herein.

Answering Plaintiff's Third Cause of Action
Herein Defendants Admit, Deny and Allege as
Follows:

I.

Referring to Paragraph I of plaintiff's third

cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered Paragraphs I, II, III and IX of plaintiff's first cause of action as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's third cause of action defendants deny that the bankrupt Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph III of plaintiff's third cause of action defendants deny that the transfer complained of was not in the regular course of business, but allege that said transfer was in fact made in the ordinary and regular course of business; except as [42] expressly denied, defendants admit each and every allegation contained in said paragraph.

IV.

Referring to Paragraph V of plaintiff's third cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

V.

Referring to Paragraph VI of plaintiff's third cause of action defendants deny generally and spe-

cifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VII of plaintiff's third cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

Answering Plaintiff's Fourth Cause of Action
Herein Defendants Admit, Deny and Allege
as follows:

I.

Referring to Paragraph I of plaintiff's fourth cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered paragraphs I, II, III and IX of plaintiff's first cause of action, as though fully set forth herein again.

II.

Referring to Paragraph II of the fourth cause of action, defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph III of plaintiff's fourth cause of [43] action, defendants admit each and every allegation therein contained except that defendants deny that the value of the stock in trade,

fixtures and equipment was the sum of \$18,727.55; Defendants further deny that the transfer complained of was not in the ordinary and regular course of business and allege that said transfer was in fact made in the ordinary and regular course of business.

IV.

Referring to Paragraph IV of plaintiff's fourth cause of action defendants admit each and every allegation there contained except that defendants deny said transfer was fraudulent and void as to creditors of the vendor and deny that said transfer is null and void as to plaintiff herein and further deny that any such statements were required by Section 5832 or any other section of the Washington Bulk Sales Law.

V.

Referring to Paragraph V of plaintiff's fourth cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

Answering Plaintiff's Fifth Cause of Action Herein

Defendants Admit, Deny and Allege as follows:

I.

Referring to Paragraph I of plaintiff's fifth cause of action defendants reassert each and every admission, denial and allegation of defendants' an-

swer to plaintiff's first, second, third and fourth causes of action and incorporate the same as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's fifth cause of action defendants deny that they took possession of or collected the accounts receivable referred to in said paragraph; that defendants have insufficient information and belief to determine whether profits [44] were made from the operation of said places of business and placing their denial on that ground deny generally and specifically said allegation.

III.

Referring to Paragraph III of plaintiff's fifth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

Answering Plaintiff's Sixth Cause of Action
Herein Defendants Admit, Deny and Allege as follows:

I.

Referring to Paragraph I of the sixth cause of action defendants reassert each and every admission, denial and allegation of defendants' answer to plaintiff's first, second, third and fourth causes of action and incorporate the same as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's sixth cause of action defendants deny generally and spe-

cifically each and every allegation therein contained; except that defendants admit the defendant Lewis Autrey was an officer and director of Autrey Brothers, Inc., on November 5, 1953, and November 16, 1953.

III.

Referring to Paragraph III of plaintiff's sixth cause of action defendants deny each and every allegation contained therein except that defendants admit that defendant Lewis Autrey was authorized to sign and draw checks on a bank account of the bankrupt located at the Bank of America, Westchester Branch, Los Angeles, California.

IV.

Referring to Paragraph IV of plaintiff's sixth cause of action, defendants deny generally and specifically each and every allegation therein contained except that defendants admit that the bankrupt Veraco, Inc., was a sales outlet of defendant Autrey Brothers, Inc. [45]

V.

Referring to Paragraph V of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VI of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VII.

Referring to Paragraph VII of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VIII.

Referring to Paragraph VIII of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

IX.

Referring to Paragraph IX of plaintiff's sixth cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

And for a Second, Separate and Affirmative Defense to the First, Second, Third, Fourth, Fifth and Sixth Causes of Action Stated by Plaintiff, Defendants Allege as follows:

I.

That on or about the 15th day of June, 1952, it was agreed by and between Vernon W. Autrey on behalf of the bankrupt Veraco, Inc., and Lewis B. Autrey on behalf of defendant Autrey Brothers, Inc., that said defendant would furnish goods,

wares and merchandise to said bankrupt on consignment for sale to the public. [46]

II.

That defendant furnished to the bankrupt all goods, wares, and merchandise used and sold by said bankrupt prior to November 5, 1953, except for certain minor accessories; that said bankrupt was to pay for the goods, wares and merchandise so furnished by defendant by depositing the proceeds of each and every retail sale in a bank account maintained at the Bank of America, Westchester Branch, Los Angeles, California, Lewis B. Autrey to have the power to withdraw funds from that bank account in order to compensate Autrey Brothers, Inc., for the cost of the goods, wares and merchandise consigned to and sold by the bankrupt.

III.

That said bankrupt sold said consigned goods, wares and merchandise to the public at a profit, but did not deposit said proceeds in said bank account nor compensate said Autrey Brothers, Inc., for said sold goods; that on the 5th day of November, 1953, the bankrupt was indebted to defendants in excess of the sum of \$95,000.00.

IV.

That on or about November 5, 1953, Veraco, Inc., Vernon W. Autrey and defendants entered into a written contract, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein by reference; that on or about November 16, 1953, the

bankrupt, Vernon W. Autrey and defendants entered into a supplemental agreement which amended and supplemented the agreement of November 5, 1953, a copy of which is attached hereto, marked "Exhibit B" and incorporated herein by way of reference.

V.

That the defendants, and each of them, have at all times done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on their part at the time and in the manner therein specified. [47]

VI.

That the goods, wares and merchandise remaining in each and every retail outlet transferred pursuant to said agreement were on consignment thereto; that title to said goods, wares and merchandise remained in and was in Autrey Brothers, Inc., at the time of said transfer.

VII.

That by reason of the premises said transfers are not subject to the Bulk Sales Acts of the States of Oregon, Washington, Utah and California as charged by plaintiff in his complaint; that said transfers were not and are not fraudulent and void, under said acts nor under Section 67(d) of the National Bankruptcy Act.

And for a Third, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV, V and VI of their second affirmative defense as though fully set forth herein again.

II.

That the bankrupt, acting through its president, Vernon W. Autrey, fraudulently concealed and diverted the funds due to Autrey Brothers, Inc., as consignor from the sale of said consigned merchandise; that the defendant Autrey Brothers, Inc., continued to consign goods, wares and merchandise to the said bankrupt during the time period in which said diversion was taking place.

III.

That by virtue of Section 2224 of the Civil Code of the State of California and by force of law the said diversion constituted the bankrupt the involuntary or constructive Trustee of said funds, and all other assets of said bankrupt for the benefit of the defendants and constituted the defendants the equitable owner thereof. [48]

IV.

That a transfer of property to the equitable owner thereof is not in violation of the Bulk Sales Acts of the States of Oregon, Washington, Utah and California.

And for a Fourth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

That the defendants obtained the transfers alleged by plaintiff to be fraudulent in good faith without notice and for a valuable consideration.

II.

That the Times-Mirror Company alleged by plaintiff to be the creditor whose rights plaintiff is exercising under Section 70(e) of the National Bankruptcy Act had knowledge of and acquiesced in said transfer.

III.

That in reliance upon the knowledge and acquiescence of said Times-Mirror Company in said transfer defendants expended sums they otherwise would not have, in improving upon the subjects which plaintiff alleges to have been fraudulently conveyed.

IV.

That by reason of said knowledge and acquiescence of the Times-Mirror Company and by reason of said reliance by defendants plaintiff is estopped from asserting the invalidity of said transfers.

And for a Fifth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth, and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV, V and VI of their second affirmative defense as though fully set forth again. [49]

II.

That in accordance with said supplemental agreement dated November 16, 1953, and in particular Paragraph IV thereof referring to the balance of monies due to defendants; said defendants attempted and requested the bankrupt and Vernon W. Autrey to meet with them for the purpose of making an accounting to determine the balance due them, the defendants, under said contract and the bankrupt and Vernon W. Autrey failed and refused to meet for the purpose of making such accounting.

III.

That accordingly on January 6, 1954, defendants made an accounting and determined that said sum due to them under the terms of "Exhibit A" and "Exhibit B" is \$54,962.28.

IV.

That said sum was due, owing and unpaid at the time Veraco, Inc., was adjudged bankrupt and is still due, owing and unpaid.

V.

That the defendants are informed and believe and on the basis of such information and belief alleged that the defendants are the largest creditors of the bankrupt; that as such the defendants were entitled to the notice prescribed by the terms of Section 58(a) (3) of the National Bankruptcy Act.

VI.

That the first meeting of creditors of the bankrupt was held August 30, 1954, at which time the plaintiff herein was elected Trustee; that the defendants were not given the notice required under Section 58(a) of the National Bankruptcy Act of said meeting.

VII.

That by reason of the said failure to give defendants said notice the actions taken at said meeting in electing plaintiff Trustee were null and void and of no force or effect. [50]

VIII.

That by reason of the premises the plaintiff herein lacked capacity to commence and lacks capacity to prosecute this action.

And for a Sixth, Separate and Affirmative Defense to Plaintiff's Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV and V of their second affirmative defense as though fully set forth herein again.

II.

That the transfer made pursuant to said agreements constitute a preference by Veraco, Inc., to its creditors, the defendants herein, and that said preference does not constitute a fraudulent conveyance under the Bulk Sales Act of the States of Oregon, Washington and Utah.

And for a Seventh, Separate and Affirmative Defense to Plaintiff's Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, and IV of their second affirmative defense as though fully set forth herein again.

II.

That defendants are informed and believe and based upon such information and belief allege that the Times-Mirror Company, the creditor whose rights plaintiff is exercising under Section 70(e) of the National Bankruptcy Act, rendered services as distinguished from the furnishing of goods, wares and merchandise, to the bankrupt.

III.

That said Times-Mirror Company is not a creditor protected under the terms of the Bulk Sales Laws of the States of Washington, Oregon, Utah and California. [51]

And for an Eighth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth, Fifth and Sixth Causes of Action, Defendants Allege as follows:

I.

That defendants are informed and believe and based upon such information and belief allege that at all times since the month of December, 1949, the bankrupt, Veraco, Inc., has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and that substantially all, if not all, of the capital stock of Veraco, Inc., was and is owned and controlled by Vernon W. Autrey, who at all times mentioned herein was and is an officer and director of said bankrupt.

II.

That defendants are informed and believe and based upon such information and belief allege that the said bankrupt in such a way and manner as to the said bankrupt in such a way and manner as to constitute said corporation his, the said Vernon W. Autrey's, alter ego.

III.

That defendants are informed and believe and based upon such information and belief allege that if said Vernon W. Autrey is made liable for the debts of said bankrupt, the assets of said bankrupt's Estate will exceed its liabilities.

IV.

That by reason of said dealing the personal assets of said Vernon W. Autrey, ought, in fairness and in equity, to be applied to the payment of the debts of the bankrupt, Veraco, Inc., before the Estate of said bankrupt attempts to enforce alleged causes of action against the defendants herein.

And for a Ninth, Separate and Affirmative Defense to Plaintiff's Sixth Cause of Action, Defendants allege as follows: [52]

I.

That if the transfers complained of by plaintiff were fraudulent under the provisions of Section 67(d) of the National Bankruptcy Act, defendants allege that said defendants were and are good faith bona fide purchasers of the assets transferred for a present fair equivalent value.

II.

That if the consideration given by defendants is determined to be less than fair, said defendants allege their right to retain the property so transferred as security for repayment as provided in Section 67(d) (6) of the National Bankruptcy Act.

Counter-Claim

For counter-claim against plaintiffs, defendants complain and allege:

I.

Defendants incorporate Paragraphs I, II, III,

IV, V, and VI of the second affirmative defense as though fully set forth herein again.

II.

That there is now due, owing and unpaid to defendants, the sum of \$54,962.28, from the bankrupt, Veraco, Inc.

Wherefore, defendants pray:

1. That plaintiff take nothing by his action;
2. That defendants be awarded their costs of suit;
3. That the bankrupt, Veraco, Inc., be declared the alter ego of Vernon W. Autrey and that said Vernon W. Autrey be made liable for the debts and liabilities of said bankrupt;
4. For judgment against the said Veraco, Inc., and its alter ego, Vernon W. Autrey, in the sum of \$54,962.28, together with interest from the due date therein; and [53]
5. For such other and further relief as to the Court seems just and proper.

ZEMAN, HERTZBERG &
SCHEKMAN,

By /s/ [Indistinguishable],
Attorneys for Defendants.

EXHIBIT "A"

Memorandum Agreement

November 5, 1953.

Lewis Autrey and Vernon Autrey hereby agree as follows:

1. Each releases the other from the interest that each has or may have in the businesses known as Autrey Bros., Inc., dba Sleep E Z Mattress Co. and Veraco, Inc.

2. Vernon Autrey hereby agrees to deliver the possession to Lewis Autrey the following stores as of November 9, 1953:

- (a) 2039 W. Pico, Los Angeles.
- (b) 17113 Bellflower Blvd., Bellflower.
- (c) 11950 E. Garvey Blvd., El Monte.
- (d) 850 S. Main St., Salt Lake City.

(this as soon as possible but not later than November 15, 1953.)

3. Vernon Autrey hereby agrees that he is indebted to Lewis Autrey in the sum of approximately \$95,000.00.

4. Lewis Autrey agrees to credit Vernon Autrey with the book value of merchandise contained in the above stores, including trucks and equipment at fair market value.

5. The balance, if any, to be paid in the following manner: \$7,000.00 by Nov. 10, '53; \$7,000.00 by Nov. 16, '53; \$7,000.00 by Nov. 21, '53.

6. The balance, if any, to be paid in twelve equal monthly payments.

7. Vernon Autrey to discontinue the use of the name Sleep E Z Mattress Co. within six months of this date.

8. Vernon Autrey to pay all bills incurred as to each store as of the date of delivery of possession.

9. Wherever the name Vernon Autrey appears herein the name Veraco, Inc., is likewise included.

VERNON W. AUTREY.

As to leases on the stores mentioned, Lewis Autrey agrees to save and hold harmless Vernon Autrey as to any future liability.

Likewise, wherever the name Lewis Autrey appears herein the name of Autrey Bros., Inc., dba Sleep E Z Mattress Co. is included.

All parties hereto hereby agree not to molest each other or cause any trouble for each other.

All bills that may be due in any of the stores incurred by Vernon Autrey must be paid by him.

Dated at Santa Monica this 5th day of November, 1953.

/s/ LEWIS B. AUTREY,

/s/ VERNON W. AUTREY.

Witnessed by:

SAMUEL SCHEKMAN,

ROBERT SILVER. [55]

EXHIBIT "B"

Supplemental Agreement

November 16th, 1953.

Supplementing agreement entered into on November 5, 1953, by and between the parties signatory hereto, it is agreed as follows:

1. That in addition to the stores enumerated in paragraph (2) of the agreement of November 5th, 1953, the following stores shall be included:

- e. 2800 N. E. Sandy Blvd., Portland, Oregon.
- f. 5311 S. Tacoma Way, Tacoma, Washington.
- g. 7808 Aurora Blvd., Seattle, Washington.

2. Lewis B. Autrey agrees to credit Vernon W. Autrey with the following, in addition to credits agreed upon in paragraph (4) of the agreement of November 5th, 1953;

Prepaid Rents	\$ 1,100.00
Signs	1,500.00
Equity in Trucks	3,000.00
Covers for Trucks	500.00
Utility Deposits	200.00
Reserves with Finance Co.....	5,000.00
Inventory in Stores	24,000.00

Provided, however, that the figures may be adjusted to conform to actual figures determined upon the taking of physical inventory at book value, and the verification of the utility deposits and reserves with

the finance companies. All the other figures are agreed upon.

3. Lewis B. Autrey agrees to pay all bills now due for advertising, current taxes, payroll and operating expenses and to deduct said payments from the credit determined as above. Contingent taxes from past operations shall be paid by Vernon W. Autrey.

4. In consideration of the above, the said Vernon W. Autrey shall not be required to make any further payments as provided for in paragraph (5) of the agreement of November 5th, 1953, but the balance if any, shall be paid in 12 equal monthly installments as provided in paragraph (6) of said agreement. Said payments to start 30 days after agreement between the parties of the correctness of the final statement. [56]

5. Paragraph (8) of the agreement dated November 5th, 1953, shall not apply as to the three stores herein enumerated.

6. In all other respects the agreement entered into on November 5th, 1953, shall be and remain in full force and effect.

Dated at Beverly Hills, California, this 16th day of November, 1953.

/s/ LEWIS B. AUTREY,

/s/ VERNON W. AUTREY.

Witnessed by:

/s/ ROBERT SILVER,

/s/ HARRY TRAUB.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed December 6, 1954. [57]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT

The plaintiff for his cause of action, leave having first been obtained to file an amended and supplemental complaint joining Sleep E-Z Mattress Co., a California corporation, as an additional party defendant, complains of the defendants and alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in his First to Sixth Cause of Action, inclusive, as set forth in the plaintiff's original complaint, and makes them and each of them a part hereof by reference to the same extent and with the same effect as though each and every one of said causes of action were specifically set [61] forth herein.

II.

That at all times subsequent to October 19, 1954, the defendant Sleep E-Z Mattress Co., was, since

has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and that all of the capital stock in said defendant Sleep E-Z Mattress Co. is owned and controlled by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey.

III.

That the defendant Sleep E-Z Mattress Co. was incorporated by the defendants, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, after the above-entitled action had been filed in this Court and summons issued, and that said defendant Sleep E-Z Mattress Co. is wholly owned and controlled by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, and the actual management of its business is under the domination and control of the defendant Lewis Autrey, who is also known as Buster Autrey.

IV.

That the defendant Lewis Autrey was subpoenaed to give his deposition in the above-entitled action at the office of Craig, Weller & Laugharn, 817, 111 West 7th Street, Los Angeles, California, on December 15, 1954, at the hour of 10:00 a.m. on said date; that at the request of the defendants, the taking of said deposition was continued to December 22, 1954, at 10:00 a.m.

V.

That said deposition was partially taken on December 22, 1954, and was adjourned to January 6,

1955, for the purpose of giving the defendant Lewis Autrey an opportunity to produce certain records which he did not have with him on December 22, 1954; that during the recess in the taking of said deposition, [62] the defendants herein, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, caused a transfer to be made of all of the retail stores set forth in the original complaint filed herein to Sleep E-Z Mattress Co. entirely without consideration, and with the intent and purpose on the part of said defendants and said Sleep E-Z Mattress Co. to hinder, delay or defraud creditors of the bankrupt, Veraco, Inc., and the plaintiff herein as Trustee in bankruptcy for its bankrupt estate, and for the purpose of rendering any judgment obtained by the plaintiff herein against said defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey ineffective; that said transfer of said retail outlets was made on or about January 1, 1955, and was made pursuant to a conspiracy, confederation and common design on the part of the defendants, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey and the Sleep E-Z Mattress Co. to hinder, delay or defraud the plaintiff herein and the creditors of Veraco, Inc.

And for a Second and Separate Cause of Action as Amended, Plaintiff Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in the

first cause of action in this amended complaint, and makes them a part hereof by reference.

II.

That further pursuant to the conspiracy, confederation and common design set forth in plaintiff's amended complaint, the defendants Lewis Autrey, Stella Autrey and Autrey Brothers, Inc., caused the home situated in the County of Los Angeles, State of California, owned by the defendants Lewis Autrey and Stella Autrey, on which they had a homestead declaration in the amount [63] of \$12,500.00, and which was encumbered by a trust deed in the sum of \$2,500.00, to be further encumbered by borrowing \$5,000.00 in cash thereon, and placing a subsequent trust deed thereon, and borrowed the additional sum of \$30,000.00 on real property owned and controlled by the defendant Autrey Brothers, Inc., and concealed or secreted the cash derived from said loans, all for the purpose of rendering said defendants proof against execution to enforce any judgment which might be obtained by the plaintiff herein against them, the said defendants.

III.

That plaintiff fears that unless a Receiver is appointed to take possession of the assets of the defendants herein, said defendants will further encumber, dissipate or otherwise dispose of the assets belonging to them or to the Sleep E-Z Mattress Co., Inc., for the purpose of rendering any judg-

ment which this Court might make, empty and ineffectual.

Wherefore, plaintiff prays judgment against the defendants and each of them as follows:

1. On the first cause of action for the sum of \$20,346.03, together with interest on said sum from November 5, 1953, at 7% per annum.

2. On the second cause of action for the sum of \$15,395.36, with interest on said sum from November 5, 1953, at 7% per annum.

3. On the third cause of action for the sum of \$21,846.68, together with interest on said sum from November 16, 1953, at 7% per annum.

4. On the fourth cause of action for the sum of \$18,727.55 at the rate of 7% per annum from November 16, 1953, at the rate of 7% per annum.

5. On the fifth cause of action, that in the event judgment is rendered in favor of the plaintiff, an accounting be [64] had between the plaintiff and defendants herein, and a Master be appointed to take such account and ascertain the amount due plaintiff from the defendants herein under such accounting, and that the plaintiff have and recover judgment against the defendants for the amount of such accounting.

6. On the sixth cause of action, for judgment against the defendants for the sum of \$76,315.62, together with interest on said sum from November 16, 1953, at 7% per annum.

7. On the first cause of action of plaintiff's amended and supplemental complaint, that the transfers set forth in Paragraph V of said amended supplemental complaint be decreed to be null and void, and of no force and effect as against creditors of Veraco, Inc., and the plaintiff as Trustee in bankruptcy of its bankrupt estate, and by reason of the fraudulent conduct on the part of the defendants herein, the plaintiff be awarded punitive damages in the sum of \$10,000.00 against the defendants and each of them, under the provisions of Section 3294 of the Civil Code of California.

8. On the plaintiff's second and separate cause of action as amended, a Receiver be appointed by order of this Court to take possession of the places of business transferred to the defendant Sleep E-Z Mattress Co., by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey to preserve the same against further fraudulent transfers and other dispositions by said defendants.

9. That the plaintiff have such other and further relief as the Court may deem just and equitable in the premises, and that he have and recover his costs and disbursements herein.

BUCHALTER, NEMER & FIELDS AND
CRAIG, WELLER & LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Plaintiff.

Duly verified.

Lodged February 9, 1955.

[Endorsed]: Filed March 2, 1955. [65]

[Title of District Court and Cause.]

ANSWER TO AMENDED AND
SUPPLEMENTAL COMPLAINT

Comes now the defendant Sleep E-Z Mattress Co., a California corporation and answering plaintiff's amended and supplemental complaint on file herein admits, denies and alleges as follows, to wit:

I.

Answering the allegations of Paragraph I of said amended and supplemental complaint, this defendant denies generally and specifically each, every, all and singular the allegations in said paragraph contained and does hereby incorporate herein by reference the answer of the other defendants to the first to sixth causes of action, inclusive, as set forth in the answer of the other defendants and makes said answer a part hereof by reference to the same extent and with the same legal force and effect as though each and every one of said answers were specifically set forth herein. [67]

II.

Answering the allegations of Paragraph II of said amended and supplemental complaint, other than admitting the incorporation of Sleep E-Z Mattress Co., on October 19, 1954, this defendant denies generally and specifically each, every, all and singular the other allegations in said paragraph contained.

III.

Answering the allegations of Paragraph III of said amended and supplemental complaint, this de-

fendant is without sufficient knowledge, information or belief to enable it to answer the allegations of said paragraph and placing its denials upon said ground, denies generally and specifically each, every, all and singular the allegations in said paragraph contained.

IV.

Answering the allegations of Paragraphs IV and V of said amended and supplemental complaint, this defendant is without sufficient knowledge or information to enable it to answer the allegations of said paragraphs and based upon said lack of knowledge, this defendant denies generally and specifically each, every, all and singular the allegations contained in said paragraphs IV and V.

Answering Plaintiff's Alleged Second and Separate Cause of Action, This Defendant Admits, Denies and Alleges as follows, to wit:

I.

Denies generally and specifically each, every, all and singular the allegations contained in Paragraph I of said second alleged cause of action.

II.

Denies generally and specifically each, every, all and singular the allegations set forth in Paragraph II of said second alleged cause of action.

III.

Denies generally and specifically each, every, all and singular the allegations contained in Paragraph III of said second alleged cause of action.

Wherefore, this defendant prays that plaintiff take nothing by his [68] complaint herein and that this defendant may be hence dismissed, together with judgment for its costs and disbursements of suit herein incurred.

/s/ BERTRAM H. ROSS,
Attorney for Defendant Sleep E-Z Mattress Co., a
California Corporation.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 22, 1955. [69]

In the District Court of the United States,
Southern District of California, Central Division
Civil No. 17354-TC

FRANK M. CHICHESTER, as Trustee in Bank-
ruptcy for the Estate of Veraco, Inc., dba Air-
est Mattress Co., Bankrupt,
Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AU-
TREY, STELLA AUTREY and SLEEP E-Z
MATTRESS CO., a California Corporation,
Defendants.

JUDGMENT AND DECREE FOR PLAINTIFF
ON PLAINTIFF'S AMENDED AND SUP-
PLEMENTAL COMPLAINT

The above-entitled action coming on for hearing
before the undersigned Judge of the above-named

Court on January 11, 1956, at 10:00 a.m. on said date, pursuant to notice, the plaintiff appearing in person and by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and Buchalter, Nemer & Fields, Murray M. Fields of counsel, and the defendants Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., appearing by their attorney, Bertram H. Ross, and testimony having been taken and evidence having been received, and the Court being fully advised in the premises, finds:

That the bankrupt, Veraco, Inc., was and now is a corporation organized and existing under and by virtue of the [76] laws of the State of California, and doing business in Los Angeles County, State of California, and elsewhere, as Veraco, Inc., also doing business as Airst Mattress Co.

That at all times herein mentioned, the defendant Autrey Brothers, Inc., was and is a corporation organized and existing under and by virtue of the laws of the State of California, and that all, or substantially all, of the capital stock of Autrey Brothers, Inc., was and is owned and controlled by the defendants Lewis Autrey and Stella Autrey who were and are husband and wife, and who were and are officers and directors of the defendant Autrey Brothers, Inc.

The Court finds that on November 9, 1953, and for a long time prior thereto, the bankrupt Veraco, Inc., was engaged as a retail merchant selling mat-

tresses and other bedding equipment at retail at certain stores located at No. 2039 W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California; 11950 E. Garvey Boulevard, El Monte, California, and with outlets outside of the State of California at No. 2800 N. E. Sandy Boulevard, Portland, Oregon; 5311 S. Tacoma Way, Tacoma, Washington; 7808 Aurora Boulevard, Seattle, Washington, and 850 South Main Street, Salt Lake City, Utah, and was purchasing and dealing with said merchandise on credit.

The Court further finds that in the States of California, Oregon, Washington and Utah, there were at all times herein mentioned certain statutes requiring acts either by publication or notice by registered mail to all creditors of a retail merchant of a proposed transfer of his stock in trade, or any substantial portion thereof, in order to make said proposed transfers valid as against existing creditors, and that in none of the instances of the transfers hereinafter described were any of said Bulk Sales Laws attempted to be complied with by the defendants herein, or any of them. [77]

The Court further finds that on November 9, 1953, the bankrupt, Veraco, Inc., transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., the entire stock, fixtures, equipment and trucks belonging to the retail stores owned and operated by said bankrupt, Veraco, Inc., located at No. 2039

W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California; 11950 E. Garvey Boulevard, El Monte, California, and 850 S. Main Street, Salt Lake City, Utah, in response to certain threats made by the defendant Lewis Autrey on behalf of Autrey Brothers, Inc., against the president of the bankrupt corporation, Veraco, Inc., to falsely accuse him, the said Vernon Autrey, of embezzlement and misappropriation of funds belonging to Autrey Brothers, Inc., and to cause a criminal prosecution to be instituted against him in the State of California; that acting under duress and over night, and without compliance with the provisions of Section 3440 of the Civil Code of California insofar as the California stores were concerned, or with Title 25, Chap. 2, Sec. 1 of the Utah Bulk Sales Law, and with the intent and purpose on the part of the bankrupt Veraco, Inc., to hinder, delay or defraud its creditors both present and future, said bankrupt transferred the retail outlets hereinbefore described to the defendants Autrey Brothers, Inc., and Lewis Autrey.

The Court further finds that on November 16, 1953, the bankrupt Veraco, Inc., likewise transferred retail outlets located at No. 2800 N. E. Sandy Boulevard, Portland, Oregon; 5311 S. Tacoma Way, Tacoma, Washington, and 7808 Aurora Boulevard, Seattle, Washington, to the defendants Autrey Brothers, Inc., and Lewis Autrey, and that at the time that all of said transfers were effectuated

ated the bankrupt was indebted to and continuously since said transfers has been indebted to the Times-Mirror Co. of Los Angeles, California, in the sum of \$2,465.87, no part of [78] which has been paid.

The Court further finds that after the above-entitled action was at issue, the deposition of Lewis Autrey was taken at the office of Messrs. Craig, Weller & Laugharn, attorneys for the plaintiff, under the provisions of the Federal Rules of Civil Procedure, beginning on December 22, 1954; that at the onset of the taking of said deposition, the defendant Lewis Autrey testified that the merchandise transferred in accordance with the description in the plaintiff's complaint was merchandise in the bankrupt's place of business on consignment, and that he did not have the consignment agreements with him but could produce the same at an adjourned hearing of the taking of his deposition; that said deposition was accordingly recessed to January 6, 1955, to give the defendant Lewis Autrey an opportunity to produce said consignment agreements; that on or about the 1st day of October 19, 1954, while the suit herein was pending, the defendants Lewis Autrey and Stella Autrey had caused to be incorporated under the laws of the State of California, the defendant Sleep E-Z Mattress Co., which corporation had no assets and no issued capital stock; that during the recess in the taking of the deposition of Lewis Autrey, the defendant Lewis Autrey caused to be transferred

all of the heretofore fraudulently conveyed assets to the defendant Sleep E-Z Mattress Co., which thereupon made another transfer of the same to another corporation known as C.A.C. Corporation, which subsequently filed a petition in bankruptcy in the United States District Court for the Southern District of California, has been adjudicated a bankrupt and is now in the process of administration of this Court.

The Court further finds that by reason of the actions of the defendants herein in transferring assets of the bankrupt corporation from one corporation to another, owned and controlled by the defendants herein, creditors of Veraco, Inc., were hindered, [79] delayed, defrauded and damaged in the sum total of \$76,315.62, and that by reason of the fraud practiced upon creditors of Veraco, Inc., the plaintiff is entitled to exemplary damages against the defendants under the provisions of Section 3294 of the Civil Code of California in the sum of \$10,000.00.

The Court further finds that a decree seeking to avoid said transfers would be useless and fruitless inasmuch as the assets so transferred have now passed by operation of law to the Trustee in bankruptcy of the ultimate transferee, C.A.C. Corporation, which was not a party to the above-entitled action, and that the only relief than can be accorded to plaintiff herein is in the form of a money judgment against the defendants herein, without prejudice to the rights of the plaintiff herein to file and

assert a claim in the bankruptcy proceeding of the C.A.C. Corporation, bankrupt, based on this judgment.

That the Court further finds that no evidence was offered in support of defendants' counterclaim against the plaintiff herein.

The Court concludes that it has jurisdiction over the persons of the defendants herein under and by virtue of Section 70(e) of the National Bankruptcy Act, and Section 3439.01, et seq. of the Civil Code of California, Title 25, Chap. 2, Sections 1, 2, 3 and 4 of the Bulk Sales Law of the State of Utah, Sections 79.010, 10.020, 79.030 and 79.040 of the Revised Statutes of Oregon, and Title 37, Chap. 2, Sections 5832, 5833, 5834 and 5835 of Remington's Revised Statutes of Washington, to set aside and avoid the transfers hereinbefore complained of; and to grant such other and further relief as the Court may deem just and equitable in the event void transfers take place in violation of said Bulk Sales Laws.

The Court concludes that the plaintiff is entitled to judgment against the defendants, and each of them, in the sum [80] total of \$86,315.62 actual and exemplary damages, together with interest on said sum at the rate of 7% per annum from the date of the filing of the above-entitled action, together with all of the plaintiff's costs and disbursements herein, to be taxed and allowed by the Clerk of this Court, and that judgment should be entered accordingly.

In consideration of the foregoing, and on motion of Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and Buchalter, Nemer & Fields, Murray M. Fields of counsel, it is

Ordered, Adjudged and Decreed, that the plaintiff have and recover judgment against the defendants, and each of them, in the sum of \$86,315.62, together with interest on said sum from the date of the filing of the original complaint herein at the rate of 7% per annum, together with all of the plaintiff's costs and disbursements herein to be taxed and allowed by the clerk, and defendants' counterclaim to be denied.

Done at Los Angeles, in the Southern District of California, this 20th day of February, 1956.

/s/ THURMOND CLARKE,

United States District Judge.

To the Defendants Above Named, and to Bertram H. Ross, Esq., Their Attorney:

Please Take Notice that on the 10th day of February, 1956, the undersigned attorneys for the plaintiff lodged the foregoing judgment and decree with Honorable Thurmond Clarke, United States District Judge, for signing. Unless you file written objections to the signing of the same within five (5) days after service of this notice upon you, the same will be signed and entered.

Dated: February 10, 1956.

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

Lodged February 13, 1956.

[Endorsed]: Filed and entered February 20,
1956. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., a California corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 20th, 1956, and from the whole thereof.

Dated this 21st day of February, 1956.

/s/ BERTRAM H. ROSS,
Attorney for Appellants, Autrey Brothers, Inc.,
Lewis Autrey, Stella Autrey and Sleep E-Z
Mattress Co., a California Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed February 23, 1956. [83]

In the United States District Court, Southern
District of California, Central Division

No. 17354-TC Civil

FRANK M. CHICHESTER, as Trustee in Bank-
ruptcy for the Estate of Veraco, Inc., dba Air-
est Mattress Co., Bankrupt,

Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AU-
TREY, STELLA AUTREY, and SLEEP E-Z
MATTRESS CO., a California Corporation,

Defendants.

Honorable Thurmond Clarke, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For Plaintiff:

BUCHALTER, NEMER & FIELDS, By
MURRAY M. FIELDS, ESQ.

CRAIG, WELLER & LAUGHARN, By
THOMAS S. TOBIN, ESQ.

For Defendants:

BERTRAM H. ROSS, ESQ.

Wednesday, January 11, 1956—10 A.M.

The Clerk: Case No. 17354, Frank M. Chich-
ester, Trustee in Bankruptcy for the estate of

Veraco, Inc., dba Airst Mattress Co., bankrupt, v. Autrey Brothers, Inc., et al., defendants.

The Court: Do you want to make a brief statement before you start in?

Mr. Ross: The first thing in order, your Honor, I think, is that we should waive a jury trial.

The Court: Yes, we do that formally.

Mr. Ross: Yes, your Honor; I wanted it on the record.

Mr. Tobin: We join in the waiver, your Honor.

The Court: Do you want to make a brief statement, Mr. Tobin?

Mr. Tobin: I think the Court will find this one of the most complicated messes the Court has ever encountered.

The Court: From whom do we inherit this one?

Mr. Tobin: Originally Judge Byrne, and then Judge Jertberg.

The Court: Well, we inherit all of Judge Jertberg's.

This was originally Judge Byrne's case?

Mr. Tobin: Originally Judge Byrne's case.

Well, in this case, the bankrupt is Veraco, Inc., a California corporation. It was owned and controlled by some [3*] brothers by name of Autrey. Two of the Autrey brothers are Vernon, who is, I notice, in the courtroom now, and Lewis Buster, one of the defendants, who is also present, of Autrey Brothers, Inc.

Autrey Brothers, Inc., was engaged in the manufacture of mattresses and bedding. Veraco, Inc.,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

was supposed to be the retail outlet for Autrey Brothers, Inc., and conducted a series of retail stores. They wound up in bankruptcy, in Referee Head's Court, owing, I believe, around \$170,000 total.

The examination of the brother Vernon in Referee Head's Court disclosed, according to Vernon Autrey, that by means of blackmail Buster Autrey had induced Vernon Autrey, who controlled Veraco, Inc., to transfer four outlets in California, without compliance with the bulk sales law of the State of California, to him, and, as I recall, it was around the 6th of November, 1953.

A few days later, on the 15th of November, 1953, using the same pressure and threatening criminal prosecution for embezzlement of funds belonging to the enterprise, four more stores were transferred. These other stores were outside the State; two of them were in Washington, one of them was in Oregon, and one of them was in Salt Lake City, Utah. No attempt was made to comply with the bulk sales laws of any of those states. They were retail outlets, and in no instance was there any attempt made to comply with the bulk sales law. [4]

We expect to show that after the suit was filed, based upon the transfer of these eight retail outlets to Autrey Brothers, Inc., this suit was started. After the issues were joined, a deposition was taken of the defendant Buster Autrey. It was taken at our office, and Buster Autrey was represented, and the defendant Autrey Brothers, Inc., was represented, by Buchalter, Nemer & Fields.

Mr. Ross: No, Mr. Tobin.

Mr. Tobin: I mean by Zeman, Hertzberg & Schekman.

The deposition started, I believe, about the 21st of December, 1954.

In the course of the deposition, Buster Autrey swore that, of the stores that were transferred, the retail stocks were all consigned merchandise and therefore there was no need to comply with the bulk sales law, and he could produce the consignment agreements.

The deposition was, accordingly, adjourned for two weeks to give him an opportunity to produce the consignment agreements he claimed he had.

In the meantime, during that two weeks adjournment of this deposition, we expect to show that Buster Autrey made another transfer of the stocks in trade from the defendant Autrey Brothers to another corporation he had organized in October, 1954, known as Sleep E-Z Mattress Company.

We then filed a motion before Judge Byrne to join the [5] Sleep E-Z Mattress Company as a party defendant, and set that up as an additional cause of action and sought to reach the merchandise.

We expect to prove that thereafter Buster Autrey disappeared and has been—he never signed the deposition that was taken before the notary public, whom we will have here, who took the deposition. We are going to endeavor to get that deposition in as admissions against interest on the part of the defendant Buster Autrey, notwithstanding

the fact that he defied the Court, defied the rules and everything else, and failed to sign it.

We have here the representative of the Times-Mirror Company and Vernon Autrey as our sole witnesses. We do not know where Buster Autrey is.

I am going to make my record by calling for him for cross-examination under the rule, Section 21(j) of the Bankruptcy Act, and we will go ahead and proceed as best we can.

The Court: All right.

Do you want to make a statement?

Mr. Ross: Yes.

May it please your Honor, Mr. Tobin, my brother across the way, is one man I know who calls a spade a dirty shovel in the easiest way possible, and I think he is stuck.

In this case we have a legalistic situation. We will admit, and offer to stipulate at this point, that the stores [6] that were transferred from Veraco Corporation to Buster Autrey in November, 1953, were transferred without compliance with the bulk sales laws of California, Washington, or Oregon. There is no question about that.

We raise this legal question: that if that be true, if that is the essence of the plaintiff's case, we are in a position to show that an existing creditor has not been produced and cannot be produced who is both a creditor at the time of the transfer and at the time of the bankruptcy of Veraco Company. In other words, the law is clear, and counsel and I, I think, can agree, that a violation of the bulk sales

law protects existing creditors but not subsequent creditors.

Now, if counsel can establish the question of actual fraud, as contrasted with a failure to comply with Section 3440 and other bulk sales laws, then subsequent creditors are protected, in which event the legal defense that I am stating is not applicable.

So far as the deposition is concerned, the evidence will indicate, and it can be produced, that until two months ago Mr. Buster Autrey, the defendant, was available to the process of this Court. It is not our fault that he didn't sign the deposition.

I did not become attorney of record in this case until long after the depositions were taken. I believe I became attorney of record in February or March of last year. If it [7] was the desire to have those depositions completed and filed, there is plenty of authority, under the rules, to have completed that.

I am going to object vehemently to the use of an incomplete deposition. Until yesterday afternoon, I was not asked to produce Mr. Autrey. Mr. Tobin wanted to know if he was available, and I said, "As far as I am concerned, I don't want him as a witness myself."

But our position is completely legalistic. Our position is definitely that, under the law, unless the Times-Mirror received no payment equivalent to the amount owed at the date of the transfers, we do not have an existing creditor within the meaning of *Moore v. Bay*, and I will quote other law later.

But that is our position. I wanted your Honor to understand our position.

The Court: All right.

Mr. Tobin.

Mr. Tobin: Is the representative of the Times-Mirror Company here?

A Voice: My name is Adams, and I was subpoenaed. I am secretary of the company. I am not entirely familiar with the handling of the details of billing and so forth.

The Court: Well have you brought someone?

Mr. Tobin: Have you brought someone here?

Mr. Adams: I have brought Mr. Bradshaw, who is the [8] assistant credit manager. He may be able to explain matters that I couldn't.

Mr. Tobin: I would like to call him then.

Thank you, Mr. Adams.

The Court: Call Mr. Bradshaw first.

Mr. Tobin: Yes, your Honor.

WILLIAM H. BRADSHAW

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William H. Bradshaw.

Direct Examination

By Mr. Tobin:

Q. What is your occupation, Mr. Bradshaw?

A. Assistant credit manager, Times-Mirror Company.

(Testimony of William H. Bradshaw.)

Q. Were you employed by the Times-Mirror Company in that capacity on October 11, 1953?

A. Yes.

Q. And have you been continuously employed by the Times-Mirror Company in that capacity ever since?

A. Yes.

Q. Are you familiar with the concern known as the Veraco Corporation, doing business as Sleep E-Z Mattress Company, with its place of business at 1490 Calzona, Los [9] Angeles?

A. Yes.

Q. Did the Times-Mirror Company have an account with that corporation?

A. Yes.

Q. Have you brought with you the ledger record of that account from October 11, 1953, to June 28, 1954?

A. Yes.

Q. And you have it with you?

A. Yes.

Q. Does that cover the Los Angeles Times alone?

A. No. It covers the——

Q. I mean that one statement.

A. The one statement does.

Q. Now, turning to the statement of the account between Veraco, Inc., and Los Angeles Mirror——

Do you have that with you?

A. Yes.

Q. Between what dates does that account cover?

A. The statement I have here covers the period of November 5, 1953, through August 27, 1954.

Q. And the one covering the Mirror account, does that cover advertising that was done in the Los Angeles Mirror?

A. Yes.

Q. And does the one that covers the Times account [10] represent advertising done in the Los

(Testimony of William H. Bradshaw.)

Angeles Times? A. Yes.

Q. The Times-Mirror Company is a corporation,
of course? A. Yes.

Q. Organized under the laws of California?

A. Yes.

Q. Was this advertising contracted for on open
account? A. Yes.

Q. And an open account carried?

A. Yes, an open account was carried.

Q. With the Times-Mirror Company?

I will ask you to state whether or not, at any
time subsequent to October 11, 1953, the bankrupt,
Veraco, Inc., was caught up and paid up entirely
with the Times-Mirror Company on this open ac-
count?

Mr. Ross: To which we object on the grounds
that it is incompetent, irrelevant and immaterial,
your Honor.

The Court: I will overrule the objection.

You may answer.

The Witness: Prior to October 11, 1953?

Q. (By Mr. Tobin): No, any time after Oc-
tober 11, 1953, until the date of bankruptcy, which
occurred on August 10, 1954, was that account ever
balanced?

A. On the Los Angeles Times, the account was
balanced January 18, 1954, and at the time of the
expiration of the [11] account there remained, of
course, an unpaid balance as of June 27, 1954.

Q. How much was that? A. \$819.33.

(Testimony of William H. Bradshaw.)

Q. How about the Mirror account? What was its condition?

A. On November 5, 1953, the balance at that particular time—this will take a little figuring here.

The record indicates that on January 11, 1954, the November, 1953, balance was paid, brought to a balance.

Q. Was there any balance carried forward?

A. And then, from that time on, the continuous placements to the date of charging off to bad debt, August 27, 1954, leaving an unpaid balance of \$1,646.54.

Q. I will ask you to state whether or not the bankrupt, Veraco, Inc., was continuously indebted to the Times-Mirror Company, either for advertising in the Times or the Mirror, or both, from and after November 9, 1953.

Mr. Ross: To which we object on the grounds that it is a conclusion and opinion of the witness, and not the best evidence. The records that have been produced are the best evidence.

The Court: I will overrule the objection and let him testify from the records here, to save time.

Do you want the question? [12]

The Witness: The record——

The Court: Can you answer it?

The Witness: The record at the Mirror, this particular ledger statement indicates that from this November 5, 1953, there was continuous placement, with the last advertisement being placed on June 25, 1954.

(Testimony of William H. Bradshaw.)

Q. (By Mr. Tobin): The question was, Was there ever a time from and after November 9, 1953, that this bankrupt was squared with the Times-Mirror Company?

Mr. Ross: That is objected to as incompetent, irrelevant, and immaterial under our legal theory, if the court please.

The Court: I will overrule the objection.

You may answer.

The Witness: Yes, I believe I previously mentioned, on Veraco, on the Times, the account was brought into balance on January 18, 1954, according to the records.

Q. (By Mr. Tobin): And how was it brought into balance?

A. By a payment made January 14 and January 18, 1954.

Mr. Tobin: Will you stipulate this is a photostatic copy of that account?

Mr. Ross: If I may see the original account. The witness has testified to entries that do not appear on my copy, so I would like to compare them, if I may, for just a moment, Mr. Tobin. [13]

The Court: Certainly.

(A pause while counsel compare documents.)

Mr. Ross: May I ask a question on voir dire?

The Court: Yes.

(Testimony of William H. Bradshaw.)

Voir Dire Examination

By Mr. Ross:

Q. The entry of August 20, 1954, is a charge-off entry? A. That is correct.

Q. Charging it off as a bad debt?

A. That is correct.

Mr. Ross: Under those circumstances, I will then stipulate that the documents counsel has handed me are photostats of the documents from which the witness has testified.

Mr. Tobin: I would like to offer this open account, if your Honor please, as Plaintiff's Exhibit 1.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Direct Examination

(Continued)

By Mr. Tobin:

Q. Has the Times-Mirror Company filed a proof of debt in the bankruptcy matter of Veraco, Inc., to your knowledge?

Mr. Ross: We will stipulate that they did, Mr. Tobin. [14]

Mr. Tobin: We will accept the stipulation.

You may cross-examine.

Just one more question.

(Testimony of William H. Bradshaw.)

Q. Has the Times-Mirror Company ever been paid the balance that is owing it?

Mr. Ross: We will also stipulate to that.

Mr. Tobin: The stipulation is so accepted.

Cross-Examination

By Mr. Ross:

Q. Mr. Bradshaw, Exhibit 1, I believe, is the Times account; is that right, sir?

A. Beg your pardon, sir?

Q. Exhibit 1 is the transcript of the ledger of the Times account; is that right?

Mr. Tobin: It is really one exhibit, I believe.

The Witness: That I don't know.

Mr. Tobin: Why not make it 1-A and 1-B, for convenience of the record?

The Court: All right.

(The documents referred to were marked Plaintiff's Exhibits Nos. 1-A and 1-B, respectively, for identification.)

Q. (By Mr. Ross): In other words, the Times account consumes two pages, does it not, of ledger sheets?

A. It is one ledger sheet, completed merely on both [15] sides.

Q. Now, as of November, 1953, am I correct in stating that the highest amount of money that was due by Veraco to the Los Angeles Times was \$262.50?

(Testimony of William H. Bradshaw.)

A. During the month of November, as I understand you——

Q. Yes, November, 1953.

A. ——the highest balance would be \$268.80.

Q. \$268.80 in November of 1953? A. Yes.

Q. Now, am I fair in stating that from November, 1953, until June, 1954, that Veraco had paid the Times more than the \$282.28 figure you have just mentioned? A. I just——

Mr. Tobin: That is objected to as being immaterial, if the court please.

Mr. Ross: That is the whole theory of the defense, your Honor.

The Court: I will overrule the objection.

Mr. Ross: Thank you.

The Court: You may answer.

The Witness: You mentioned two hundred eighty-something dollars, sir. It is \$268.80.

Q. (By Mr. Ross): Taking your figure of \$268.80 and amending my question, it is true, is it not, sir, that between November, 1953, and June, 1954, that the Times-Mirror Company [16] received from Veraco more than that sum of money; isn't that correct? A. Yes.

Q. And isn't it a fact also that you testified that as of January 18, 1954, the account was in balance? A. Yes.

Q. And at that time Veraco owed nothing to the Los Angeles Times; is that correct, sir?

A. That is correct.

Q. Now, turning to the account of the Mirror,

(Testimony of William H. Bradshaw.)

which is Exhibit 1-B, would you say that it is correct that the highest sum that was due to the Mirror as of November, 1953, was \$435.96?

A. According to this particular ledger sheet, that is true.

Q. Have you any other information, other than the ledger sheet?

A. I don't have the prior two ledger sheets for November.

Q. Is it also fair to state, Mr. Bradshaw, that after November, 1953, and down to June, 1954, the Mirror received in remittances from Veraco an amount in excess of \$435.96?

Mr. Tobin: I make the same objection as I did to the last question, that it is immaterial, if the course please.

The Court: I will overrule the objection. [17]

You may answer.

The Witness: As I understand your question, that payments were received in excess of the amount owing at that particular time?

Q. (By Mr. Ross): Yes.

A. That is correct.

Q. It is also correct, is it not, that as of January 11, 1954, the account was in balance; isn't that correct?

A. That I would have to figure out with pencil and paper here to determine whether it was. From all indications, the payment of January 11, 1954, would bring it into balance as of December, 1953.

Q. Then, as of December, 1953, based upon the

(Testimony of William H. Bradshaw.)

payment made in January, 1954, there was a time when the account was paid and nothing was owing to the Mirror; is that right?

A. With the January 11th payment, plus credit, the account was paid. As I say, I would have to figure it out, but from all indications here, just looking at it, without putting it on pencil and paper, that particular payment, plus a previous payment of December 18, 1953, would have cleared up the balance as of December, 1953.

Mr. Ross: Thank you very much.

I have no further questions. [18]

Redirect Examination

By Mr. Tobin:

Q. Was there ever any time subsequent to November 9, 1953, that Veraco, Inc., didn't owe the Times-Mirror Company anything at all?

A. I can't answer that without having the complete records, sir, which I don't have with me.

Q. Well, does your record cover the period between November 9, 1953, and the date of bankruptcy, which occurred on August 10, 1954?

A. From November, 1953, to——

Q. Yes, November 9, 1953.

A. I thought you meant prior to that date.

Q. No.

A. I am sorry, sir. Would you reask the question, please?

Mr. Tobin: Would you read the question, please?

(Testimony of William H. Bradshaw.)

(The reporter read the questions as follows:
“Q. Was there ever any time subsequent to November 9, 1953, that Veraco, Inc., didn’t owe the Times-Mirror Company anything at all?”)

The Witness: If I understand your question, if I may, in other words, prior to——

Q. (By Mr. Tobin): No, subsequent to November 9, 1953—after November 9, 1953, was there ever a time that Veraco, [19] Inc., didn’t owe the Times-Mirror Company something?

A. On the Los Angeles Times, as of that January 18, 1954, date, there was nothing owing at that particular time.

Q. How about the Mirror?

The Court: Well, we will take a short recess, Mr. Tobin. You can check with him. He has his other man coming in at the rail now.

We will take a short recess of five or six minutes, and you can get these figures straightened out.

(A recess.)

The Court: You may take the stand again.

Did he get everything?

Mr. Fields: Not quite everything, but at least he has some explanation of the figures before him.

The Court: You may continue.

Q. (By Mr. Tobin): I believe the pending question was whether or not, on November 9, 1953, or at any time thereafter, the bankrupt, Veraco,

(Testimony of William H. Bradshaw.)

Inc., owed the Times-Mirror Company nothing on open account.

A. Do you want me to—just yes or no?

Q. Yes. A. At no time.

Q. I am thinking particularly about that January, 1954, entry that you testified to, that you said balanced it out as far as the Times was concerned. [20]

A. Well, in interpreting these ledger sheets here, on the Mirror, at no time was the account—there was always a balance due on the particular account of two——

Mr. Ross: I move that everything except the answer “No” go out as being nonresponsive, if the court please.

The Court: Yes, I will let the answer “No” remain, and the rest will go out.

Q. (By Mr. Tobin): In regard to the Times, I believe you testified on direct examination that there was one time, in January, I believe, of 1954, that the Times account had balanced out?

A. Yes.

Q. Can you tell us whether or not there had been a debit item against the bankrupt prior to January 18th which had not yet been posted?

Mr. Ross: Just a moment. I object to the question on the ground that the documents are in evidence and they speak for themselves.

Mr. Tobin: According to the records——

Mr. Ross: It is not the best evidence when the documents are before the court.

(Testimony of William H. Bradshaw.)

The Court: I will overrule the objection. I will let him answer.

The Witness: Answer the question?

The Court: Yes. [21]

The Witness: On January 18th, where the last payment previously mentioned brought it into balance, the next posting was an item of January 17, 1954, for an advertisement in the amount of \$369.60.

Q. (By Mr. Tobin): That is \$369.60?

A. \$369.60. That particular January 17th posting, which, according to the books, should have been posted prior to the January 18th occasion, would have left that amount of balance owing at that particular time.

Q. And unpaid? A. As an unpaid item.

Mr. Tobin: That is all.

Recross-Examination

By Mr. Ross:

Q. Mr. Bradshaw, directing your attention to Plaintiff's Exhibits 1 and 1-A, which are photo-stats of your ledger sheets, were those records kept in the ordinary and due course of business of the Times-Mirror Company? A. Yes.

Q. And the postings of payments were made in the course of business, were they not?

A. Yes.

Q. Were these accounts kept under your direction and supervision? [22]

A. Yes, indirectly.

(Testimony of William H. Bradshaw.)

Q. What do you mean by that, sir?

A. As an assistant. The direct supervision would be, of course, my superior.

Q. And who is your superior?

A. Mr. Sikes.

Q. So far as you know, no special application was made, as to these payments, to any particular account; they were merely credited to the account, isn't that correct?

A. I don't believe I understand your question. "No special application" what?

Q. There was no special application made that any particular payment was in payment of a particular indebtedness; in other words, the payments were merely credited to the account as a running account, isn't that correct? A. Yes.

Q. And that was done in the ordinary and due course of business? A. Yes, that is correct.

Mr. Ross: I have no further questions of Mr. Bradshaw.

Mr. Tobin: That is all.

The Court: You may step down.

Mr. Tobin: I would like to call Vernon Autrey under Section 21(k) of the Bankruptcy Act.

The Court: Do you want the people to go [23] now?

Mr. Tobin: He may be excused as far as we are concerned, your Honor.

The Court: All right.

Mr. Autrey.

Mr. Ross: May it please the court, at this time,

before the witness is sworn, I object to this witness being called under Section 21(k) of the Bankruptcy Act. This is a plenary civil action, and the witness is either being called as a witness for the plaintiff under the general laws of the United States or he is not being called for that purpose.

The Court: I will let him be called. Really, it is a close technical point; it is something like Section 2055. It really doesn't make any difference. I will let him call him under that section.

VERNON W. AUTREY

called as a witness by the plaintiff under the provisions of Section 21(k) of the Bankruptcy Act, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Vernon W. Autrey.

Direct Examination

By Mr. Tobin:

Q Where do you live?

A. At 1025 South Orchard Drive, Inglewood, California. [24]

Q. Were you an officer of the bankrupt corporation, Veraco, Inc.?

The Witness: I would like to refuse to answer any questions today on the grounds that it might incriminate or degrade me in certain matters of different things, and until I have advice from my attorney and have him present.

(Testimony of Vernon W. Autrey.)

Mr. Tobin: And by whom——

The Court: I will overrule the objection. I think it is all right here. This is a civil action. It is not going to affect him in any way.

You can answer it.

The Witness: All right.

What was the question?

Mr. Tobin: Would you read the question, please?

(The reporter read the pending question as follows: “Q. Were you an officer of the bankrupt corporation, Veraco, Inc.?”)

The Witness: Yes.

Q. (By Mr. Tobin): And what kind of business was Veraco, Inc., engaged in?

A. Retail bedding business.

Q. And was it a California corporation?

A. Yes.

Q. And what office did you hold in the bankrupt corporation? [25]

A. I was president.

Q. Over what period of time?

A. I believe it was from June, 1952, up until the bankruptcy, August 10, 1953.

Q. Are you acquainted with a man by name of Lewis Autrey? A. Yes.

Q. And is he any relative of yours?

A. Yes.

Q. Are you acquainted with Stella Autrey?

A. Yes.

Q. What relationship is she of yours?

(Testimony of Vernon W. Autrey.)

A. A sister-in-law.

Q. And Lewis Autrey is your brother?

A. My brother, yes.

Q. And was Autrey Brothers, Inc., a California corporation? A. As far as I knew, it was.

Q. Do you know who operated and controlled Autrey Brothers, Inc.? A. Yes.

Q. Who? A. Lewis B. Autrey.

Q. And who operated and controlled Veraco, Inc.? A. Myself. [26]

Q. And in which part of the business was Autrey Brothers, Inc., active?

A. Manufacture of the products.

Q. And in which part was Veraco, Inc., active?

A. Retailing the products.

Q. And whereabouts did Veraco, Inc., have its place or places of business?

A. In California, Oregon, and Washington and Utah and Arizona.

Q. Prior to November 9, 1953, did Veraco, Inc., have a retail place of business at No. 2039 West Pico Boulevard, Los Angeles? A. Yes.

Q. And did it have a retail place of business at No. 17113 Bellflower Boulevard, Bellflower, California?

A. It might have for a week; it was a short time.

Q. But it was prior to November 9, 1953?

A. Yes.

Q. And did it have another place of business at No. 11950 East Garvey Boulevard, El Monte?

(Testimony of Vernon W. Autrey.)

A. Yes, for a short period.

Q. Did it also have a place of business at Salt Lake City? A. Yes.

Q. Where was it located? [27]

A. At 450 South Main Street.

Q. And all four of those places of business were engaged in the retail sale of bedding?

A. Yes.

Q. And mattress equipment?

A. Yes—not equipment, just bedding; mattresses and box springs and accessories.

Q. That is what I mean, bedding equipment.

A. Yes, bedding accessories.

Q. Now, on November 3, 1953, were these places of business transferred to anyone?

Mr. Ross: Just a moment. I object on the ground that counsel is leading this witness, if the Court please.

The Court: Well, it will shorten it and save time. I will overrule the objection.

You may answer.

The Witness: Could I hear the question again?

Mr. Tobin: Yes.

Would you read it please.

(The reporter read the pending question as follows: “Q. Now, on November 3rd”—)

Mr. Tobin: No, on November 9th.

The Reporter (Reading): “Q. Now, on November 9, 1953, were these places of business transferred to anyone?” [28]

(Testimony of Vernon W. Autrey.)

The Witness: Yes, on November 5th they were, some of them, transferred.

Q. (By Mr. Tobin): To whom?

A. To Autrey Brothers, Inc.

Q. Did that transfer take place in regular business hours? A. No.

Q. What time of day did the transfer occur?

A. Of an evening; around six or seven or eight o'clock of an evening.

Q. And what places of business were transferred on that occasion in the evening?

A. On November 5th, as well as I can remember, it was the Bellflower address and the El Monte address and, I believe, the Salt Lake City address and the Pico Street address—West Pico in Los Angeles.

Q. And whereabouts did that transfer take place?

A. At the Autrey Brothers factory in Santa Monica.

Q. And who was present at the time that the transfer occurred?

A. Veraco or Autrey Brothers.

Q. Who were the persons present?

A. I was president—Present?

Q. Yes, who were present at the time the transfer took place? [29]

A. Myself and attorney for myself, a Mr. Silver, and Mr. Schekman and Lewis B. Autrey and Harry Traub, and it seems like brother Floyd Autrey was there at the time.

(Testimony of Vernon W. Autrey.)

Q. Did any conversation take place at that time leading up to the transfer of these outlets that you have testified to?

A. There were several conversations.

Q. And who participated in them?

Mr. Ross: Do you mean at that meeting, Mr. Tobin?

Mr. Tobin: At that meeting.

The Witness: Myself and Lewis Autrey and Harry Traub.

Q. (By Mr. Tobin): What did those conversations pertain to?

Mr. Ross: That calls for a conclusion. You can ask him what the conversation was.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Tobin): What, if anything, was said by you and by your brother Lewis Buster Autrey at that conversation?

A. There was so much said I can't remember a detailed outline of it.

Q. Well, give us the substance of it.

A. They were claiming that I owed so many thousands of dollars and they wanted full payment or some of the stores for it, and we had agreed on giving them four stores at that time and so much per week. [30]

Q. Was there any threat of criminal prosecution made to you unless you transferred those four stores to Autrey Brothers, Inc.?

A. Yes, there was.

Q. And by whom was that threat made?

(Testimony of Vernon W. Autrey.)

A. Lewis B. Autrey.

Q. And did Lewis B. Autrey tell you how much money you were supposed to have misappropriated that belonged to Autrey Brothers?

A. I have heard three or four times from \$50,000 to \$200,000.

Q. And were you frightened?

A. Certainly.

Q. And as a result of that conversation then, that you had with Lewis Autrey and his attorneys, did you make this transfer?

A. Yes, we did.

Q. Approximately what was the value of the merchandise that was transferred from Veraco, Inc., to Autrey Brothers in that transfer?

A. At that transfer, just a guess at it, was forty, forty-five thousand dollars.

Q. In stock?

A. Yes, and equipment of trucks and stock and locations and things of that nature. [31]

Q. And then was there another transfer that occurred later on?

A. Yes, about a week or two weeks later on, there was three more stores transferred.

Q. Where were they located?

A. Seattle, Tacoma, and Portland, Oregon.

Q. What were the circumstances under which those stores were transferred?

A. Well, this first agreement was to pay \$7,000 a week, which I couldn't pay.

Q. To whom?

(Testimony of Vernon W. Autrey.)

A. To Lewis B. Autrey, Autrey Brothers; and we relinquished the other three stores to keep from having to meet the \$7,000 payment each week.

Q. And did you at any time prior to the transfer of these stores give any notice to the creditors of Veraco, Inc., that you intended to transfer these stores in Oregon and Washington? A. No.

Q. By registered mail? A. No, I never.

Q. Did you give any notice of any kind or description to any of the creditors of Veraco, Inc., that it was your intention to transfer its retail outlets to Buster Autrey? A. No, I never. [32]

Q. Do you know whether or not Buster Autrey gave any such notice to any of the creditors?

A. Not that——

Mr. Ross: May I be heard a moment? I offered a stipulation that I thought was accepted.

Mr. Tobin: I believe it was, but——

Mr. Ross: Then I would like to be relieved from that stipulation.

Mr. Tobin: We have also a part of this complaint, your Honor please, that this transfer was made——

The Court: I think the stipulation takes care of all that.

Mr. Tobin: It is a matter of atmosphere, on the question of intent.

The Court: Well, I will sustain the objection. The stipulation takes care of that, I think.

Q. (By Mr. Tobin): I believe you testified that

(Testimony of Vernon W. Autrey.)

two of these stores were in the State of Washington? A. Yes.

Q. Whereabouts were they located?

A. One in Seattle, Washington, and one in Tacoma, Washington.

Q. And whereabouts was the store in Seattle located? A. 7808 Arroyo Boulevard.

Q. What was the value of its stock and equipment? [33]

A. Approximately about fifteen to eighteen thousand dollars.

Q. With regard to the store at Tacoma, Washington, where was it located?

A. I don't remember the correct address. It was on Tacoma Way, but I don't remember the correct address. Might be 5211.

Q. 5311 South Tacoma Way?

A. It might have been that.

Q. In Tacoma? A. Yes.

Q. What was the value of the stock and fixtures in that store?

A. From four to six thousand dollars. That was a small store.

Q. Then the store at Portland, Oregon, where was it located?

A. At 2800 Northeast Sandy Boulevard.

Q. And what was the value of the stock and fixtures in that store?

A. Approximately ten to twelve thousand dollars, as well as I recall.

Q. Now, after you got through with these two

(Testimony of Vernon W. Autrey.)

transfers which took place on November 5th and November 16th, 1953, what other assets did Veraco, Inc. have left to pay its [34] creditors?

A. It had four or five small outlets in the Bay area in California.

Q. You mean in the San Francisco Bay area?

A. Yes. And I believe we established a place here on Calzona Street. I think there were one in Sacramento, California. There was, I think, five small outlets left.

Q. Well, on November 16, 1953, these transfers had been completed, had they? A. Yes.

Q. When did you open the outlets in the Bay area around San Francisco?

A. That was opened—some of them was already opened before any transfers, and some of them was opened later. I don't recall just which ones they were. And they were moved from one location to the other.

Q. Well, do you have any personal knowledge of any subsequent transfers of these retail outlets made by your brother Buster Autrey or Autrey Brothers, Inc.? A. Since——

Q. Since this lawsuit was started?

A. Yes, I have a few knowledges of them.

Q. Will you please tell the court about those subsequent transfers?

A. Most of mine is hearsay. Transferred some Kansas [35] City stores to another operation.

Q. Known as what?

(Testimony of Vernon W. Autrey.)

A. As—well, that was known as Autrey Brothers, and he had transferred part of the operation in the Western States here to himself and to Sleep E-Z Mattress, Inc.

Q. Now, when was this Sleep E-Z Mattress, Inc. organized?

A. I understand sometime in 1954. I don't really know.

Q. October, 1954? A. I understand it was.

Q. And you were examined in the Bankruptcy Court before Referee David Head on August 30, 1954, and again on September 2, 1954, regarding these transactions? A. Yes.

Q. And you disclosed to the trustee, Mr. Chichester, the transfer of these stocks in these various retail outlets to Buster Autrey?

Mr. Ross: Just a moment. I object to counsel testifying, your Honor, and further object—

The Court: Yes, I will sustain the objection to the question.

You have made it too lengthy, Mr. Tobin.

Q. (By Mr. Tobin): Did you, at the examination of the first meeting of creditors, held on August 30, 1954, and September 2, 1954, disclose to the plaintiff, Frank [36] Chichester, the circumstances under which these transfers had been made?

Mr. Ross: I object to that on the grounds that it is incompetent, irrelevant, and immaterial, your Honor. He can't impeach his own witness.

The Court: I will overrule the objection.

You may answer.

(Testimony of Vernon W. Autrey.)

The Witness: I tried to notify Mr. Chichester of any changes that I had seen, at each time.

Q. (By Mr. Tobin): Now, subsequent to the first meeting of creditors held in Referee Head's court on August 30, 1954, did your brother Buster Autrey tell you that he had been sued by the trustee in bankruptcy for the estate of Veraco, Inc.?

A. He never told me. I had heard it from other sources.

Mr. Ross: I move the answer be stricken as being nonresponsive, your Honor.

The Court: It may go out.

Q. (By Mr. Tobin): Did you ever discuss with him the fact that he had been sued? A. No.

Q. Did he ever discuss with you the fact that he had been sued? A. No. [37]

Q. Have you had any conversations with Buster Autrey since this suit was filed in this court on——

Mr. Ross: October 19, 1954.

Q. (By Mr. Tobin): ——October 19, 1954?

A. Yes, I have.

Q. Did he discuss the fact that this suit was pending, with you?

A. He might have mentioned it, but he didn't discuss any of it with me.

Q. Did he tell you anything about a subsequent transfer of the place of business situated at No. 2800 Northeast Sandy Boulevard, Portland, Oregon?

A. The transfer of it?

Q. Yes, after this suit was filed.

A. Not that I know of.

(Testimony of Vernon W. Autrey.)

Q. Do you know anything about a store situated at 850 South Main Street, Salt Lake City, Utah?

A. Yes.

Q. And was that owned by Veraco, Inc.?

A. It was once.

Q. Was that the store that was transferred at Utah? A That is right.

Q. To Autrey Brothers, Inc.? A. Yes.

Q. Do you know what ultimately became of that stock? [38] A. Yes.

Q. What was done with it?

A. As it is now, the store is closed, and the stock was sold through a liquidator in Salt Lake City by the name of Jack Bowman, and a company that I am associated with at present, another company, has bought most of the stock from them.

Q. What is the name of that company?

A. Mattress City at Salt Lake City.

Q. Mattress City? A. Yes.

Q. And is that organized under the laws of the State of Utah?

A. No; under the State of Texas.

Q. Under the State of Texas?

A. It is a Texas corporation.

Q. Who owns that corporation?

A. Dunbar and myself.

Q. And was Dunbar connected with Veraco, Inc.? A. No, never was.

Q. Was he connected with Autrey Brothers?

A. He was a salesman at one time.

Q. When was this store at 850 South Main

(Testimony of Vernon W. Autrey.)

Street put out of the name of Autrey Brothers, Inc.?

A. As well as I can remember, around the first of the [39] year it was transferred to Buster Autrey.

Mr. Ross: First of what year?

The Witness: This year—'55, rather.

Q. (By Mr. Tobin): Since this case has been set for trial?

A. Well, I don't know when.

Q. What were the circumstances under which this store got out of the name? It was in the name of Autrey Brothers. It was transferred——

A. Well——

Q. Let's follow this through. That store was transferred from Veraco, Inc. to Autrey Brothers, Inc., a California corporation?

A. That is right, yes.

Q. And then, subsequent to that, it was transferred from Autrey Brothers to——

A. Lewis B. Autrey.

Q. ——Lewis B. Autrey? A. Yes.

Q. Individually?

A. Yes, around January 1, 1955.

Q. The defendant here? A. Yes.

Q. And then what transfer occurred after that?

A. Well, he had become insolvent and had made some [40] arrangements with the creditors, his creditors, to liquidate it and sell them out, and made some kind of arrangements for payment. I don't actually know all the details of it, but I do

(Testimony of Vernon W. Autrey.)

know that all of the stores are closed and sold out now.

Q. Well, this Salt Lake City business was transferred then from him to whom?

A. Nobody. It was just closed at that time.

Q. And a liquidator sold it out?

A. The trustee in bankruptcy. It was transferred to a CAC Corporation, I believe.

Q. And that CAC Corporation is in bankruptcy in Referee Brink's court at the present time, is it not?

A. I think it is in Bergener's court.

Q. Referee Bergener's court?

A. Yes; and the receiver has sold inventory out of the Salt Lake City store.

Q. Who purchased the inventory from the receiver of CAC Corporation?

Mr. Ross: That is objected to on the grounds that it is incompetent, irrelevant, and immaterial, and it is far afield of any of the issues in this case, your Honor.

Mr. Tobin: On this question of intent, too.

The Court: I will overrule the objection.

You may answer.

The Witness: There is a Premier Sales—the president [41] of it is Jack Bowman of Salt Lake City—had purchased this inventory and a truck from the trustee in bankruptcy.

Q. (By Mr. Tobin): What I am getting at, Mr. Autrey: Has that stock gotten back into the hands of one of the brothers, regardless of how circuitous the route was?

(Testimony of Vernon W. Autrey.)

A. Well, I suppose that you would say that half of it got back in my hands.

Q. How many brothers are there of you?

A. Four.

Q. And what are their names?

A. That is, in this business, is Floyd Autrey, Lewis B. Autrey, myself, and E. T. Autrey.

Q. And you are all four in the bedding business?

A. Yes, that is right.

Q. And throughout what states do your various bedding business ramifications extend?

Mr. Ross: Just a moment. I object to the form of the question, your Honor.

Mr. Tobin: It is on the question of intent, too.

The Court: I will overrule the objection.

You may answer.

The Witness: I was only connected in the four states, but some of the other brothers have operated it as far as Kansas City.

Q. (By Mr. Tobin): Where is Lewis Buster Autrey right [42] now?

A. I understand he is in Los Angeles here.

Q. When did he come back to Los Angeles?

A. I heard about two months ago. I haven't talked to him.

Q. Was he the person who suggested to you when you were called as a witness here to refuse to answer on the ground that your answer would tend to incriminate you?

A. No, he was not.

(Testimony of Vernon W. Autrey.)

Q. You haven't talked to him about being called here as a witness? A. No, I haven't.

Q. Getting to the second store, the store at 2800 East Sandy Boulevard, Portland, Oregon, what has become of that store?

A. That was moved to Seattle. That was closed and moved to Seattle.

Q. And the stock moved out of Oregon?

A. Yes.

Q. Into Seattle, Washington? A. Yes.

Q. And when was that done?

A. Four or five months ago or longer. I don't know the exact date it was. And that also was controlled and owned by CAC Corporation, and it was also sold. [43]

Q. Who are the stockholders of this CAC Corporation?

A. Mr. Harry Traub was 50 per cent of the stockholders, and I was 50 per cent.

Q. Did Harry Traub have any relationship at all with Veraco, Inc.? A. Yes.

Q. In what capacity?

A. He was accountant for the firm.

Q. And was he also the accountant for Autrey Brothers, Inc.? A. Yes.

Q. And was he the personal accountant for Lewis B. Autrey?

A. As far as I know, yes.

Q. And he handled your accounting, too?

A. Yes, he did.

(Testimony of Vernon W. Autrey.)

Q. When was this CAC Corporation, that you refer to, organized?

A. I believe it was in about April, 1955.

Q. In Texas?

A. No; California corporation?

Q. It is a California corporation? A. Yes.

Q. And how much money did you put in this CAC Corporation? [44]

Mr. Ross: Just a moment. I object to that as being incompetent, irrelevant, and immaterial, not binding on the defendants in this action, and completely remote to the problem at hand, your Honor.

The Court: I will overrule the objection.

You may answer.

The Witness: I put in inventory and equipment that I had in a small company in San Diego and Compton, in the CAC Corporation.

Q. (By Mr. Tobin): You had an inventory in San Diego and Compton? A. Yes.

Q. Standing in your individual name?

A. No, it was in—it was sort of a partnerships with a Mr. and Mrs. Hardebeck. We had a store there and a small factory in Compton.

Q. Will you please tell us under how many different trade names you and your brothers conducted your bedding business?

A. I think there was four, all together, with the exception of the corporation.

Q. Veraco, Inc., was one, wasn't it?

A. Yes, doing business as Sleep E-Z Mattress and Airst Mattress Company.

(Testimony of Vernon W. Autrey.)

Q. And Sleeprest? [45] A. No.

Q. Didn't you have a number of Sleep E-Z or Sleep—— A. No.

Q. ——concern trade names that you were doing business under in various parts of the country?

A. One brother was operating under "Sleepopedic Mattress Company."

Q. What's that?

A. Sleepopedic Mattress Company.

Q. Where was that?

A. That is in Texas.

Q. How many operations did you have in the State of Washington? We will go at it geographically. How many operations did you have in the State of Washington?

Mr. Ross: Referring to this witness or——

Q. (By Mr. Tobin): You or your brothers?

Mr. Ross: Thank you.

Q. (By Mr. Tobin): The four of you?

A. As far as I know, the only ones I know was Sleep E-Z Mattress Company, and then——

Q. Where? A. In Washington.

Q. Whereabouts in Washington?

A. At these same locations: 7800-7808 Arroyo Avenue and 4501 South Rainier in Seattle, Washington, and Portland, [46] Oregon; and the only two names that we operated was Sleep E-Z Mattress Company and Airst Mattress Company.

Q. And they were actually owned originally by Veraco?

A. The Sleep E-Z was owned by Veraco until

(Testimony of Vernon W. Autrey.)

we had made our transfer, and I omitted using Sleep E-Z and I had to use Airst Mattress Company.

Q. And Autrey Brothers was the actual owner?

A. Yes.

Q. And then where did the Seattle and Tacoma outlets ultimately wind up?

A. In bankruptcy—of CAC.

Q. Well, trace it right on through, please.

A. Well, they had closed up the Tacoma store and moved it into the 7808 Arroyo store.

Q. That is, at Seattle?

A. Yes, Seattle. They had operated and opened up a store at 4501 South Rainier in Seattle, and they had operated those three stores until they transferred them to CAC Corporation, and CAC Corporation has filed a petition in bankruptcy and they have liquidated them.

Q. And who ultimately got those stocks in trade?

A. I don't know——

Mr. Ross: You mean from the trustee in bankruptcy?

Mr. Tobin: Yes.

The Witness: I don't know. [47]

Q. (By Mr. Tobin): Did you?

A. No, I never got them.

Q. Or any corporation owned and controlled by you? A. No.

Q. Or any of the Autrey brothers?

A. No.

Q. That you know of?

(Testimony of Vernon W. Autrey.)

A. No, none of the Autrey brothers.

Q. Going one state farther south—Oregon, what operations did the Autrey brothers have in Oregon? And by “Autrey brothers” I refer to you four brothers under your various corporate enterprises.

A. Yes, the same as the Seattle store, and it was transferred to CAC Corporation and eventually was liquidated by the Bankruptcy Court.

Q. And who ultimately bought the Oregon store?

A. It was just closed and moved into Seattle, and from there it was liquidated through the Bankruptcy Court.

Q. Now, getting down to the State of California, how many operations did you four Autrey brothers have in the State of California?

A. Well, Lewis Autrey had Sleep E-Z Mattress Company.

Q. That was the corporation he organized in October, 1954—or '53, rather?

A. No. At first he was doing business as an individual [48], fictitious firm name of Sleep E-Z Mattress Company.

Q. Well, wasn't that a corporation?

A. Not at first. The second——

Q. Was it ever a corporation?

A. It was. We formed Sleep E-Z Mattress, Inc., I think, the last of 1954.

Q. That was after this suit was started: is that right?

(Testimony of Vernon W. Autrey.)

A. I don't know what time this suit was started, today.

Mr. Ross: We will stipulate it was after this suit was filed.

Q. (By Mr. Tobin): And then, after suit was started, he transferred what stores to Sleep E-Z Mattress Company, Inc.?

Mr. Ross: If any, Mr. Tobin.

Mr. Tobin: Yes.

The Witness: I think he transferred the Seattle store, Salt Lake——

Q. (By Mr. Tobin): We will get to the Salt Lake later. A. I don't actually know.

Q. How about these California stores that wound up in the——

A. At that point I don't know whether he transferred them into the Sleep E-Z Mattress, Inc., or—— I know he had a creditors' meeting, and his creditors wanted him to do business as an individual instead of a corporation, and at [49] that time he was wanting to transfer them into this corporation, Sleep E-Z Mattress, Inc., that he had formed. I don't know whether he ever did or not. The creditors requested him to operate as an individual.

Q. Well, now, getting back to the California operations, what operations were carried on in the State of California by you four Autrey brothers?

A. Well——

Q. If you will outline them to the court.

Mr. Ross: As to what period of time, Mr. Tobin?

(Testimony of Vernon W. Autrey.)

Q. (By Mr. Tobin): During the period between November 5, 1953—November 4, 1953, and the date of the bankruptcy of Veraco, Inc.?

A. Well, Lewis B. Autrey and E. T. Autrey and Floyd Autrey, the three brothers, operated as Sleep E-Z Mattress Company, and they were stockholders, or supposed to have been, in Autrey Brothers, Inc., and doing business as Sleep E-Z Mattress Company, and I was doing business as Veraco, as the owner and doing business as Airst Mattress Company, and I think that is all that I know that they operated under.

Q. And was Lewis B. Autrey a director of Veraco—an officer? A. No.

Q. Wasn't he vice-president of Veraco, Inc.?

A. He might have been vice-president. I know he never [50] went to a meeting of the corporation at all.

Q. Well, he had a great deal to say about the operation of Veraco, Inc., did he not?

A. Yes.

Q. And didn't he have a right to sign checks on its bank account? A. That is right.

Q. And didn't Harry Traub have a right to sign checks on the bank account?

A. Yes, he did, a short period.

Q. And did you? A. Yes, I did.

Q. Now, was there any partnership arrangement between Autrey Brothers and Veraco, Inc.?

A. Yes, a verbal agreement between us.

(Testimony of Vernon W. Autrey.)

Q. What is that?

A. It was a verbal agreement; not a written one.

Q. And when was this partnership arrangement entered into between the two corporations?

A. When we first started; I would say around the middle of the year of '52.

Q. And what was the verbal arrangement?

A. The arrangement was——

Mr. Ross: I object to that as calling for a conclusion of the witness, your Honor. There was some conversation in [51] which——

Q. (By Mr. Tobin): State the conversation, then.

The Court: All right, give us the conversation, if any.

Mr. Ross: Let's have the foundation, too.

The Witness: The conversation was——

Mr. Ross: Just a moment.

The Court: He wants the foundation.

Mr. Tobin: Just a moment.

Q. Who participated in this conversation, on behalf of Veraco, Inc.? A. I did.

Q. And who participated in this conversation on behalf of Autrey Brothers, Inc.?

A. Lewis B. Autrey.

Q. And where did the conversation take place?

A. There was several conversations. Sometimes at Veraco's office.

Q. Between what periods of time?

(Testimony of Vernon W. Autrey.)

A. Oh, between March of 1952 and throughout the year of '52.

Q. And who was present at these various conversations?

A. Most of the time, Lewis B. Autrey and myself.

Q. Taking up the preliminary conversations at which this arrangement was arrived at, what was said by you and what was said by Lewis [52] Autrey? A. About what, for instance?

Q. About what arrangements you were going to have between the two corporations for your operation and participation in profits?

A. Well, we had agreed on Veraco would sell the item and give production to the factory at an even quote—no profit, you know—and the factory was to make the profit, and we were to divide the profit of the factory.

Q. In other words, Autrey Brothers was to manufacture, and Veraco was to sell?

A. Yes.

Q. And how long did this partnership arrangement between these two corporations—

Mr. Tobin: I withdraw that.

Q. You owned and controlled Veraco, Inc.?

A. That is right.

Q. And your brother Lewis owned and controlled Autrey Brothers, Inc.?

A. That is right.

Q. Was there any attempt made to inject any

(Testimony of Vernon W. Autrey.)

other of your brothers in the arrangement between Autrey Brothers, Inc., and Veraco, Inc.?

A. Not until 1953, November.

Q. And in 1953 when was there an effort made, if any, to inject some more of your brothers [53] into it?

A. Yes, around the first of November of '53.

Q. Was that what caused the rift between yourself and Buster? A. I believe it was.

Q. And who proposed to inject some of your other brothers?

Mr. Ross: I don't quite understand counsel's question—"inject." It is rather uncertain to me.

Mr. Tobin: I withdraw it.

Q. Who was it proposed to connect some of your other brothers with the operations of these two corporations?

A. It was Lewis B. Autrey and the other two brothers was proposing to have them to take over half of it—Veraco.

Q. And what were they to pay you?

A. Nothing.

Q. In other words, they wanted what proportion of Veraco, Inc., the bankrupt, to be turned over to three of your brothers?

Mr. Ross: Just a moment. I object to the form of the question as calling for a conclusion of the witness and a hearsay answer, your Honor.

Mr. Tobin: It is preliminary, your Honor.

The Court: I will overrule the objection.

(Testimony of Vernon W. Autrey.)

You may answer.

The Witness: It was one-half of it. [54]

Q. (By Mr. Tobin): And what arrangements were to be made then to pay the creditors of Veraco, Inc., after the one-half of the business was turned over to your other brothers?

A. At that point, the only creditors of Veraco was mostly newspapers.

Q. Well, what newspapers were they?

A. They were the Seattle Times and Salt Lake Tribune and the Los Angeles Examiner and various newspapers throughout the operation, and television, and our supplies was owed to Autrey Brothers, Inc.

Q. And what arrangements were contemplated to take care of these various newspapers throughout the West Coast?

A. They were being paid each month as a monthly bill. We didn't owe any great sums to them, only a regular course of business at that time.

Q. Can you give us an approximation of what the indebtedness of Veraco, Inc., is at the present time?

A. I think it is around one hundred twenty to one hundred thirty thousand.

Q. One hundred twenty to one hundred and thirty thousand dollars? A. Yes.

Q. And what assets did Veraco, Inc., have to meet those debts when you got through with this arrangement with [55] your brother Buster?

(Testimony of Vernon W. Autrey.)

Mr. Ross: Just a moment. That assumes a fact not in evidence, your Honor. There is no testimony——

The Court: I will sustain the objection.

Q. (By Mr. Tobin): As against the one hundred and twenty to a hundred and thirty thousand dollars in liabilities owed by the bankrupt, Veraco, Inc., what assets did it have?

Mr. Ross: Just a moment, Mr. Tobin. I want to find out, did it owe the hundred and twenty thousand in November, 1953, or was this at the time it filed its petition in July or August, 1954? I think that makes a difference.

Mr. Tobin: At the date of bankruptcy.

The Court: I will overrule the objection.

Q. (By Mr. Tobin): At the date of bankruptcy, how much did Veraco, Inc., owe?

A. Approximately one hundred and twenty to one hundred and thirty thousand dollars at the date of bankruptcy.

Q. And what assets did it have to meet those liabilities?

Mr. Ross: Just a moment. I object on the grounds that it is incompetent, irrelevant, and immaterial, your Honor. What its liabilities were at the time of its adjudication in bankruptcy in August, 1954, is too remote in time from these transfers. I think the essential element of the plaintiff's theory of the case is correct as to what

(Testimony of Vernon W. Autrey.)

the assets and [56] liabilities were at the time of transfer.

Mr. Tobin: Section 67——

The Court: I will overrule the objection.

You may answer.

The Witness: It was around a thousand dollars.

Mr. Tobin: About a thousand dollars to pay one hundred and twenty thousand dollars in liabilities.

If your Honor please, we have here the reporter from Referee Rifkind's court.

The Court: Do you want to put him on out of order?

Mr. Tobin: Yes, if your Honor please.

The Court: Step down, please.

We will put him on out of order. Do you want him to read his notes?

Mr. Tobin: I don't believe it will be necessary, your Honor.

The Court: All right. Put the reporter on.

LOUIS SOMMERS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows.

The Clerk: State your full name, please.

The Witness: Louis Sommers. [57]

Direct Examination

By Mr. Tobin:

Q. Mr. Sommers, you are the official reporter for Referee Joseph Rifkind? A. I am.

(Testimony of Louis Sommers.)

Q. And you are also a certified court reporter?

A. I am.

Q. I will ask you to state whether or not you attended on the taking of the deposition of one Lewis Buster Autrey, commencing December 22, 1954, and adjourned to January 6, 1955, and resumed on January 6, 1955, in this case, which is No. 17354-TC, entitled Frank Chichester as Trustee in Bankruptcy for the estate of Veraco, Inc., doing business as Airst Mattress Co., bankrupt, against Autrey Brothers, Inc.; Lewis Autrey, and Stella Autrey, defendants.

A. I was the reporter at those depositions.

Q. And as such reporter did you swear the defendant Lewis Buster Autrey?

A. I did, as notary public.

Q. And did you take down his testimony in shorthand? A. I did.

Q. In question and answer form?

A. Yes, sir.

Q. Did you thereafter transcribe this deposition into longhand? [58]

A. It was transcribed under my direction.

Q. That is what I mean. And thereafter did Mr. Autrey at any time appear, pursuant to the stipulation contained in that deposition——

Mr. Ross: Just a moment. To which we object on the ground that it calls for a conclusion——

Mr. Tobin: I am not through yet.

Mr. Ross: I'm sorry.

(Testimony of Louis Sommers.)

Q. (By Mr. Tobin): Thereafter, did Mr. Autrey at any time, pursuant to the stipulation contained in that deposition, appear to sign the deposition?

Mr. Ross: To which we object on the ground that the question calls for a conclusion of the witness, to appear pursuant to the stipulation contained in the deposition.

Mr. Tobin: I will withdraw the question and reframe it, your Honor.

The Court: All right.

Q. (By Mr. Tobin): Subsequent to the taking of this deposition on December 22, 1954, and on January 6, 1955, did the defendant Lewis Buster Autrey ever appear before you to examine this deposition and swear to its correctness?

Mr. Ross: To which we object on the grounds that it is incompetent, irrelevant, and immaterial.

May it please the Court, it is obvious, and I think counsel will agree, that this deposition has never been [59] signed. The law requires that before a deposition can be used in this court it has to be signed and sworn to by the witness. There is a statutory method requiring the compliance to use the deposition as evidence. Under Rule 32(d) of the rules for the government of the business of these courts, I move to suppress that deposition upon the grounds that it has never been signed or filed, and I have never had any opportunity to know if there was any desire to use the deposition.

The ordinary and usual method is that if a dep-

(Testimony of Louis Sommers.)

osition is not signed at some time prior to the trial, or a request is made upon counsel or somebody to have it signed, if it is not, a citation for contempt issues, and the matter is ordered by the court to be signed and the witness has an opportunity.

Just because counsel has either been lazy or negligent is no reason to attempt to get a deposition in by a back-door method where the law permits it to come in properly.

Mr. Tobin: If your Honor please, in the case of Sampsell v. Anches that very question arose in the Ninth Circuit in connection with the use of a Section 21(a) transcript of a witness who was later a defendant in an action in Seattle brought by the trustee in bankruptcy against a person who had been examined in the Bankruptcy Court under Section 21(a) regarding transfers of property made by a dishonest bankrupt to him. [60]

At the time of trial in Seattle, an objection was made to the introduction of this Section 21(a) transcript on the ground that it was in the nature of a deposition and was inadmissible because of the fact that it had not been taken in accordance with the regular deposition practice. An objection was sustained to the introduction of this, and a verdict ultimately was directed in favor of the defendants.

The case went up to the Ninth Circuit, and the Ninth Circuit reversed the district judge in Seattle and held that that deposition was admissible both as substantive proof—I mean that that Section

(Testimony of Louis Sommers.)

21(a) transcript was admissible both as substantive proof of the facts and for the purpose of impeachment against the person from whom the testimony was elicited.

The result was, the District Court was reversed and the Ninth Circuit definitely laid down the rule, following a former case of *Slattery v. Dillon*, that as an admission against interest it was admissible.

Here we have a situation, if your Honor please, where in good faith, represented by other attorneys, prior to the trial of this case and in this proceeding, one of the defendants, Buster Autrey, who admittedly owns and controls Autrey Brothers, was brought in and his deposition was taken on two different occasions. He walked out of the deposition room, and we haven't seen him since. [61]

Certainly a deposition ought not to be suppressed by reason of the misconduct on the part of this defendant who has not even appeared here at the trial of this case.

The Court: Mr. Ross.

Mr. Ross: May it please the Court, in the first place, the *Anches* case dealt with a Section 21(a) examination in bankruptcy. There is no question in my mind that if a witness takes the stand, his testimony on any prior occasion, whether it is under Section 21(a) or any other form, can be used for the purpose of impeaching him as contradictory statements having been made.

(Testimony of Louis Sommers.)

But here in this case, this is a deposition taken under Rules 26, 27, 28, 29, 30, 31, 32 and 33 of the Rules of Federal Procedure. Now, counsel can't yell "Bad faith" if he just didn't follow the rules and get his testimony and his discovery completed.

I submit that if Mr. Autrey were to take the witness stand in this case and testify, that the deposition could be used for the purpose of impeaching him. But the deposition cannot be used as a part of his case in chief.

Now, obviously, counsel says Mr. Autrey isn't here. As the attorney for the defense, it is my prerogative to produce such witnesses as I feel may be necessary. And there is no showing that there has ever been any attempt by the plaintiff to have Mr. Autrey produced at this time. There is [62] no showing that any subpoena was in the hands of the Marshal. Nor is there any showing that any request has been made upon me since February of 1955 to have this deposition signed. Neither has there been any request made of Judge Byrne or Judge Jertberg or of yourself, your Honor, to request this man to read and correct this deposition.

I don't think counsel, by his own lack of diligence, can start calling names at other people.

I submit the deposition isn't admissible.

The Court: I will overrule the objection.

The witness may answer the question.

Mr. Ross: An exception may be noted?

The Court: Yes.

(Testimony of Louis Sommers.)

The Witness: I have forgotten the question.

Mr. Tobin: Would you read the question, please?

(The reporter read the pending question as follows: "Q. Subsequent to the taking of this deposition on December 22, 1954, and on January 6, 1955, did the defendant Lewis Buster Autrey ever appear before you to examine this deposition and swear to its correctness?")

The Witness: No, he did not.

Q. (By Mr. Tobin): Has that deposition ever been signed by Buster Autrey, to your knowledge?

A. Not to my knowledge. I just don't [63] know.

The Court: We can stipulate that it is not signed?

Mr. Ross: So stipulated, your Honor.

The Court: It is stipulated that it is not signed. The witness wouldn't know.

Mr. Tobin: I would like to have this marked as plaintiff's exhibit next in order for identification.

The Clerk: Plaintiff's Exhibit 2.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: Is that all for the witness?

Mr. Tobin: I believe I will ask just one more question, your Honor.

Q. Showing you Plaintiff's Exhibit 2 for identification, I will ask you to examine that and tell us if that is a true and correct transcription in

(Testimony of Louis Sommers.)

longhand of the testimony given by the defendant Lewis Buster Autrey on January 6, 1955, and December 22, 1954?

Mr. Ross: May it be stipulated that, without repeating the objection and the exception, it may continue?

The Court: All right.

Mr. Ross: Thank you.

The Witness: To the best of my knowledge, this is a true and correct transcript of the testimony of Buster Autrey on those two dates.

The Court: All right. [64]

Mr. Tobin: We would like to offer that in evidence, if your Honor please.

Mr. Ross: To which we object upon the grounds that no proper foundation has been laid; no compliance has been had with Rules 26, 27, 28, 29, 30, 31, and 32 of the Rules of Federal Procedure.

The Court: In view of the court's previous ruling, I will overrule the objection and allow it to be received.

Mr. Ross: Exception, your Honor.

The Court: Yes.

Mr. Ross: Thank you, your Honor.

(The document referred to, marked Plaintiff's Exhibit No. 2, was received in evidence.)

Mr. Tobin: That is all as far as this witness is concerned, your Honor.

(Testimony of Louis Sommers.)

Cross-Examination

By Mr. Ross:

Q. How long have you known that I have been attorney of record for the defendants in this action?

A. I didn't know it up until this moment, and I still don't know your name.

The Court: You will stipulate that he came in after this? Isn't that correct?

Mr. Tobin: That's right. [65]

Q. (By Mr. Ross): No request was ever made of me to have Mr. Autrey sign this deposition?

A. Not by my office.

Q. And as far as you know, as notary public, you have taken no proceedings to have the deposition signed?

A. That is correct.

Mr. Ross: No further questions, your Honor.

The Court: That is all. The witness may be excused. We will take a recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 p.m. of the same day.)

The Court: Do you want to put the witness back on the stand?

Mr. Tobin: Yes, your Honor.

VERNON W. AUTREY

resumed the stand as a witness called by the plaintiff under the provisions of Section 21(k) of the Bankruptcy Act and, having been previously duly sworn, testified further as follows:

Direct Examination

(Resumed)

By Mr. Tobin:

Q. Now, this morning, when I questioned you regarding a threat of criminal prosecution, was it true that you had misappropriated or embezzled funds belonging to the bankrupt corporation, Veracruz, Inc., in the sum of approximately \$95,000?

A. No.

Q. Was there any truth to that charge made by your brother Buster Autrey to that effect?

A. No, there was no truth whatsoever.

Q. Now, you entered into an agreement with Buster Autrey, you acting on the part of the bankrupt corporation and Buster acting on behalf of Autrey Brothers, Inc., on [67] November 5, 1953, did you? A. Yes.

Q. And that agreement was in writing, was it?

A. Yes.

Q. And in that agreement you admitted in writing, did you, that you owed Buster Autrey and Autrey Brothers \$95,000?

A. Yes. We didn't know how much it was or——

Mr. Tobin: I believe, counsel, during the noon hour we agreed that we could use the copy in place

(Testimony of Vernon W. Autrey.)
of bringing the original from the Superior Court
(handing document to Mr. Ross).

Mr. Ross: Yes, I am familiar with the document. If you want to have it marked——

Mr. Tobin: Yes.

Mr. Ross: ——It may be received without further identification.

The Clerk: Plaintiff's Exhibit 3.

The Court: All right. You may just refer to it.

Mr. Tobin: This is Plaintiff's Exhibit 3.

The Clerk: For identification?

Mr. Tobin: We are offering it in evidence. It has been stipulated to.

(The document referred to, marked Plaintiff's Exhibit No. 3, was received in evidence.)

Q. (By Mr. Tobin): Now, calling your attention to the [68] provisions in Plaintiff's Exhibit 3, bearing date of November 5, 1953, and particularly provision 3: "Vernon Autrey hereby agrees that he is indebted to Lewis Autrey in the sum of approximately ninety-five thousand dollars"; was that true?

A. Well, there is no way of knowing whether it was true or not, the way it was enforced out. We don't know.

Q. Did you make any investigation to ascertain whether or not you were indebted to Lewis Autrey or Autrey Brothers, Inc., in the sum of \$95,000?

A. We tried to, but we never could get together.

Q. How did you arrive at that figure of \$95,000?

(Testimony of Vernon W. Autrey.)

A. He arrived at it; not me.

Q. It was his—— A. Suggestion.

Q. ——figure? A. Yes.

Q. Showing you a supplemental agreement, dated November 16, 1953, which we are asking to have marked for identification as Trustee's Exhibit 4 for identification——

The Clerk: Exhibit 4.

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Tobin): ——was that supplemental agreement signed up and executed on November 16, 1953? A. Yes, it was. [69]

Mr. Tobin: We would like to offer this in evidence, if your Honor please, also.

Mr. Ross: No objection, your Honor.

The Court: All right.

The Clerk: Plaintiff's Exhibit 4.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Tobin): Now, these agreements, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 now in evidence, were the agreements under which the stores at 2039 West Pico, Los Angeles, 17113 Bellflower Boulevard, Bellflower, 11950 East Garvey Boulevard, El Monte, 850 South Main Street, Salt Lake City, were transferred on November 5, 1953, were they not? A. Yes.

(Testimony of Vernon W. Autrey.)

Q. And the stores at 2800 Northeast Sandy Boulevard, Portland, Oregon, 5311 South Tacoma Way, Tacoma, Washington, and 7808 Arroyo Boulevard, Seattle, Washington, were transferred on November 16, 1953; isn't that true? A. Yes.

Q. Now, in exchange for the transfer of these three stores in Los Angeles County and the one at Salt Lake City, what were you, or, rather, the bankrupt Veraco, Inc., to receive?

A. Full value on the \$95,000 that he figured that we owed him. [70]

Q. And what was the credit that was to be extended by Lewis B. Autrey or Autrey Brothers, Inc.?

A. Fair market price and book value of all merchandise.

Q. What was that taken in at, in connection with that agreement, Plaintiff's Exhibit 3?

Mr. Ross: Pardon me. Wasn't there an exhibit attached to the agreement that set the items forth. Mr. Tobin?

Mr. Tobin: There doesn't appear to be here. Oh, yes, it is in the agreement of November 16th—
Withdraw that.

Q. When you had gotten through signing the Plaintiff's Exhibits 3 and 4 in evidence here, what did you have left then to pay the creditors of Veraco, Inc.?

A. Approximately five stores, small stores, value of around \$30,000.

(Testimony of Vernon W. Autrey.)

Q. How much?

A. Value, as well as I can remember, of around twenty-five or thirty thousand dollars.

Mr. Ross: I see that counsel is examining what purports to be the bankruptcy file of Veraco; is that right?

Mr. Tobin: That is right.

Mr. Ross: I have no objection to counsel offering anything in that file that he may want to, by reference, in this proceeding, subject to the objection I am going to make [71] generally as to any valuation that existed in August of 1954 as being remote as to the financial condition of Veraco in November, 1953, when this transaction occurred.

The Court: I will overrule the objection.

Q. (By Mr. Tobin): Calling your attention to the schedules in bankruptcy file in this court, in Case No. 62384-T, on August 23, 1954, I will ask you to examine those schedules and tell us if that is your signature on there—"Vernon W. Autrey, president, Veraco, Inc." A. Yes.

Q. And calling your attention to the "Summary of Debts and Assets, Schedules A and B," in that bankruptcy proceeding, I will ask you to state whether or not, at the date of the filing of the petition in bankruptcy in this court, is it or is it not a fact that Veraco, Inc., actually owed \$132,271.01?

Mr. Ross: Just a moment. May it be understood that my objection runs to this on the grounds of remoteness, your Honor?

The Court: Yes. I will overrule the objection.

(Testimony of Vernon W. Autrey.)

Mr. Ross: We will stipulate that the schedules so show, Mr. Tobin.

Mr. Tobin: Well, I think, on that question of intent to hinder, delay, or defraud, that the atmosphere is——

The Court: Well, he stipulates that the schedules so [72] show.

Mr. Tobin: Yes, your Honor.

The Court: I think that is sufficient.

Q. (By Mr. Tobin): Are those schedules true and correct, to the best of your knowledge?

A. Yes, they are.

Q. Insofar as the liabilities and assets of the bankrupt corporation are concerned?

A. That is right.

Mr. Tobin: At this time, if your Honor please, we would like to offer these schedules in evidence by reference.

Mr. Ross: Same objection, your Honor.

The Court: I will overrule the objection.

By reference.

(The documents referred to, marked Plaintiff's Exhibit No. 5, were received in evidence by reference.)

Mr. Ross: Mr. Tobin, I don't want to interfere with you, but why don't you ask him if it doesn't show liabilities of fifty-nine thousand against those?

Mr. Tobin: The liabilities are a hundred and thirty-two thousand.

(Testimony of Vernon W. Autrey.)

Mr. Ross: And assets of fifty-nine thousand against those.

Mr. Tobin: Yes, that is what I say. That is what I was trying to ask him. [73]

Q. Was there any——

The Court: The schedules show that.

Mr. Tobin: Yes.

The Witness: Yes.

Q. (By Mr. Tobin) That is a fact, is it not?

A. Yes, on accounts receivable plus the assets. Yes.

Q. Out of the \$59,565.40 worth of assets that were on hand to meet \$132,271.01 of liabilities at the date of the bankruptcy, \$46,235.40 of those were accounts receivable, were they not?

A. Yes.

Q. And those accounts receivable were hypothecated to a finance company, were they not?

A. No.

Q. Where were they?

A. These was accounts receivable of dealerships in various cities that owed Veraco, Inc.

Q. Well, were they collectible, in your opinion, a hundred cents on the dollar, or fifty cents, or what?

A. I believe they were, a hundred cents on the dollar.

Q. I see. At the time you entered into these two agreements, Plaintiff's Exhibits 3 and 4, with Autrey Brothers, Inc., and your brother Lewis B.

(Testimony of Vernon W. Autrey.)

Autrey, you contended, did you not, that they owed you, or owed Veraco, Inc., \$52,111.69; isn't that right? [74]

A. No, at the time that we signed these agreements we didn't really know. We didn't know whether they owed us or we owed them.

Q. Did you have an auditor make any audit whatever to ascertain—— A. We tried to.

Q. ——whether or not, in truth and in fact, Veraco, Inc., or you owed Autrey Brothers, Inc., or Buster Autrey \$95,000, or whether or not they owed you—— A. We tried to.

Q. ——or your corporation \$52,111.69?

A. No. At that time we tried to, several months later, but we never could get the accountant and Lewis B. Autrey to get together to figure it out, you know.

Q. Well, how long did you take to complete these two transactions, that is, the transaction of November 5th and the transaction of November 16th? A. About one hour each time.

Q. About one hour each time. And it was done where?

A. At 1812 Lincoln Boulevard. Autrey Brothers' factory.

Q. You tell us why these transactions were so speedily gone through with.

A. That's the way you have to do business with him, is all I know. You just don't do business on a regular basis. You do it right now or not at all. [75]

Q. When you were first called to the stand here

(Testimony of Vernon W. Autrey.)

today as a witness and the first question was asked you, I believe, regarding your connection with Veraco, Inc., you at first declined to answer on the ground that your answer would tend to degrade and incriminate you, and said you had been so advised. By whom were you advised that if you testified in this case your answer would tend to degrade or incriminate you?

A. I was not advised. I was asking to be advised by my attorney and have him to be present at the questioning here.

Q. When did you last see Buster Autrey?

A. About two months ago.

Q. And where was that?

A. At 7300 South Vermont in Los Angeles.

Q. And you haven't seen him for at least two months? A. Approximately two months.

Q. Has he talked to you on the telephone since this case was set for trial?

A. No, not for the last two months.

Q. Do you know where he is at the present time?

A. No. He is in Los Angeles, as far as I know.

Q. Do you know where?

A. Unless it is at this address.

Q. 7300 South Vermont? [76] A. Yes.

Q. And what is the residence address supposed to be here in Los Angeles?

A. I don't know where he lives.

Q. Now, you employed an auditor in connection with this transaction, did you not?

(Testimony of Vernon W. Autrey.)

A. Yes.

Q. A man by name of Lester Green?

A. Yes.

Q. And the result of his audit indicated that Autrey Brothers owed Veraco the sum of \$52,-111.69; isn't that right?

Mr. Ross: To which we object upon the grounds that that would call for hearsay and a conclusion and opinion of this witness, what the auditor found.

The Court: I can let him answer, if he knows.

Do you know?

The Witness: No. With all the records we have or had at Veraco's, that is the only thing we figured out, that it was——

Q. (By Mr. Tobin): It was from the records of Veraco that that figure was arrived at?

A. Yes.

Q. And discussed between you and Lewis Autrey?

A. It was not discussed between Lewis Autrey and myself. It was discussed with Mr. Lester Green and myself. [77]

Q. And you filed an affidavit over here in the Superior Court, in Action No. 625431, Lewis Autrey and Autrey Brothers, Inc., against Vernon Autrey and Veraco, Inc., did you not?

A. No; that was Lewis Autrey filed.

Q. Didn't you file an affidavit in connection with that matter, too?

A. An answer to it, I believe, yes.

(Testimony of Vernon W. Autrey.)

Q. Pardon me? A. Yes, we did.

Q. And in that affidavit, did you not state that instead of you owing Autrey Brothers, Inc., \$95,000, that they actually owed your corporation \$52,111.69?

A. As well as we could account for, yes.

Q. Yes? A. Yes, we did.

Q. And that was your honest belief, was it not, at the time you signed this agreement?

A. Yes, at that time.

Q. In which you admitted that you owed Autrey Brothers \$95,000?

A. Yes, that is after we had released all of the stores to them.

Q. After you had released all of the stores to them, how did you expect to pay about \$130,000 of liabilities— [78] \$132,000 of liabilities?

Mr. Ross: That is objected to on the ground that it assumes a fact not in evidence, your Honor.

The Witness: We never——

Mr. Ross: Pardon me just a moment.

We object to that because it assumes a fact not in evidence, your Honor. There is no evidence that in November, 1953, Veraco owed any \$132,000. The evidence is that they owed it in August, 1954.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Tobin): After you had transferred these stores described in Plaintiff's Exhibits 3 and 4, did the liabilities of Veraco, Inc., increase?

A. Yes.

Q. From what figure to what figure?

A. As well as I can remember, our liabilities at

(Testimony of Vernon W. Autrey.)

that time, November 5th to the 14th or the 16th, was approximately \$24,000 overdrawn in the bank and we owed around twenty-five thousand in other payables.

Q. About \$50,000? A. Yes.

Q. And then between November 16, 1953, and the date of the bankruptcy of Veraco, Inc., the liabilities of Veraco, Inc., jumped up to \$132,000?

A. Yes. [79]

Q. And in November, 1953, that is, November 16, 1953, after you had transferred these eight stores to Autrey Brothers, Inc., what assets did Veraco have remaining to pay its creditors?

A. As well as I remember, it was from twenty-five to thirty thousand dollars of assets.

Q. Did the transfer of these stores from Veraco, Inc., to Vernon Autrey have the effect of rendering Veraco, Inc., insolvent?

A. You mean the transferring from Veraco to Lewis Autrey?

Q. Or to Lewis Autrey, yes.

A. Yes, it did.

Q. Did you tell Lewis Autrey at the time that you made these transfers to him, these eight stores, under threat of criminal prosecution for embezzling \$95,000, that if those stores were transferred to him you would not have sufficient to pay your creditors?

A. I think I told that to him and several other people at the time.

Q. Well, him in particular? A. Yes.

(Testimony of Vernon W. Autrey.)

Q. He and Stella Autrey were the owners of Autrey Brothers; is that right?

A. Yes, as well as I know. [80]

Q. Was he a director of Autrey Brothers?

A. I believe he was.

Q. And she is his wife? A. Yes.

(A pause.)

The Court: Anything more from him, Mr. Tobin?

Mr. Tobin: I can't think of anything now, your Honor.

You may cross-examine.

Cross-Examination

By Mr. Ross:

Q. Mr. Autrey, as I understand it, in November, 1953, at the time you executed Plaintiff's Exhibits 3 and 4, you were under the belief that you owed Buster Autrey some money, weren't you?

A. Yes. We really didn't know. We thought Veraco owed Autrey Brothers some money. We did not know.

Q. You honestly believed you owed some money, but didn't know the amount of it; isn't that right?

A. That is right.

Q. You didn't believe you had embezzled any money from your brother, however? A. No.

Q. As a matter of fact, at these two meetings at which Plaintiff's Exhibits 3 and 4 were executed, you had your [81] attorney there, didn't you?

A. Yes, I had an attorney.

Q. And Mr. Buster Autrey, your brother, had

(Testimony of Vernon W. Autrey.)

his attorney there, didn't he? A. Yes.

Q. Nobody used any force on you, did they?

A. No, no force.

Q. Nobody had any deadly weapons or armaments around? A. No.

Q. You had the use of your legs, didn't you?

A. Yes.

Q. In other words, you signed those documents because you honestly believed it was an indebtedness to your brother; isn't that right?

A. Yes, of some sort.

Q. Later you did file a suit in the Superior Court against him, did you not?

A. No, sir.

Q. Or did he file a suit against you?

A. He filed it against me.

Q. And then you filed a cross-complaint in that action, did you not?

A. We were attempting to, but we only answered it.

Q. Now, as a matter of fact, there has been, from time to time, ill feeling between yourself and your brother Lewis [82] Autrey; isn't that true?

A. Yes.

Q. As a matter of fact, isn't it true that these stores that are involved in this litigation, in this lawsuit, were transferred by your brother Lewis Autrey out of Autrey Brothers, a corporation, about a year later, about the time this lawsuit was filed; isn't that right?

A. I don't remember dates.

(Testimony of Vernon W. Autrey.)

Q. Well, didn't Buster Autrey sell to one of the other brothers all of the capital stock of Autrey Brothers, Inc.? A. I heard he did, yes.

Q. And didn't he take out of Autrey Brothers, Inc., the stores on the Pacific coast? A. Yes.

Q. And then about that time didn't you come back with your brother and start operating these various stores that are in dispute here now?

A. Some of them.

Q. Some of them? A. Yes.

Q. And then they were eventually transferred into this CAC Corporation; isn't that right?

A. That is right.

Q. And CAC Corporation filed a petition in this court? A. Yes. [83]

Q. So some of those stores are presently, or were, under the jurisdiction of this court; isn't that right? A. That is right.

Q. Now, you continued to operate Veraco for seven or eight months, did you not, after you made the transfer of these stores to your brother?

A. Approximately that.

Q. And you made an honest endeavor during that time to pay your bills, didn't you?

A. Yes, I did.

Q. And you opened new stores? A. Yes.

Q. Did you have any secret agreement with your brother, Buster, that you had any interest in these stores that you transferred to him? A. No.

Q. Never made any claim to them, did you?

A. No.

(Testimony of Vernon W. Autrey.)

Q. Other than the fact that in this lawsuit you set forth that you were in error when you admitted that you were indebted for \$95,000?

A. We figured we overpaid our debt.

Q. As a matter of fact, the affidavit that Mr. Tobin prepared—read to you, was prepared by your attorney; isn't that right? [84]

A. Yes, it was.

Q. From the facts you gave him? A. Yes.

Mr. Ross: I don't think I have anything else, your Honor.

The Court: Is that all, Mr. Tobin?

Mr. Tobin: That is all, your Honor.

The Court: You may step down.

Mr. Tobin: We would like to offer, by reference, if your Honor please, the order approving the trustee's bond in the bankruptcy proceeding.

The Court: All right.

Mr. Tobin: Has the court had an opportunity to read the deposition?

The Court: You just put it in about five minutes to twelve.

Mr. Tobin: Yes, your Honor.

The Court: I was going to try to read it at night. I will have to take the case under submission.

Mr. Tobin: I think that is our case, if your Honor please.

The Court: You already have the deposition in evidence.

Mr. Tobin: Yes, your Honor.

The Court: But I will have to read it tonight. I will have to take the case under submission. [85]

Mr. Tobin: Yes.

The Court: Does the plaintiff rest at this time?

Mr. Tobin: We are resting at this time, yes, your Honor.

The Court: All right.

Mr. Ross: May it please the court, at this time the defendants move for a nonsuit as to each and every cause of action that is pleaded in the plaintiff's complaint and supplemental complaint.

The basis of the motion is this: That the proof before the court establishes only a failure to comply with the bulk sales laws of California and the other states. There is no proof in the deposition or in the testimony that there was any actual fraud in this matter.

Apparently, the evidence is that we have a couple of brothers who are in business together, and they have their fights. So on one occasion one says, "You owe me \$95,000. You are going to pay or else."

I am not impressed by the charges of malicious prosecution, when the evidence indicates that each of the parties, at the time the agreements were entered into, without conflict, were represented by attorneys, and Mr. Autrey on the witness stand said there was nothing wrong with his legs—he could have left the meeting and there was no reason for him to stay there if he didn't want to sign this agreement.

In the absence of actual fraud, we have a type of

fraud [86] that is established by law, failure to comply with Section 3440.

Now, the evidence in this case is without dispute that the only creditor that plaintiff has to offer, who was a creditor at the time of the transfer and at the time of the bankruptcy, was the Times-Mirror Company or the Los Angeles Times and/or the Mirror. The evidence indicates that the amounts that were paid on the account of the Times-Mirror Company between the date of the transfer and the adjudication of the bankruptcy exceeded that amount of that account; so therefore the original account was extinguished.

Your Honor is familiar with the rule set forth in Section 1479 of the Civil Code of the State of California, that unless there is a direction or instruction as to the application of payments, first in is first out. So therefore the indebtedness was definitely extinguished.

My case law is submitted in the authorities that were submitted with the motion for summary judgment in the matter. I agree that summary judgment did not reach anything except the Section 3440 situation. If there was proof of actual fraud, then of course there would be a different situation. But I have cited the authorities in there that the trustee does not come into this court as a creditor armed with process. He has nothing to do with an existing creditor. In other words, if the Times-Mirror had money coming in [87] November, 1953, and no payments were made until 1954, then the trustee in bankruptcy would be in the position of the Times-

Mirror armed with a writ of execution, and then the court would be in a position to hold the transfer void and fraudulent and require an accounting.

But here we don't have that sort of thing. This type of lawsuit, may it please your Honor, is a technical thing. It is a creature of the Bankruptcy Act and a group of decisions of the Supreme Court of the United States. I have very carefully cited in the authorities attached to the points and authorities in support of the motion for summary judgment a rather complete statement of the authorities, involving *Moore v. Bay*, a leading case on the subject, Section 1479, and the other material. I am not going to bore your Honor.

The Court: I had that, and I denied a motion for summary judgment.

Mr. Ross: Yes, your Honor, but obviously the reason for your denial was that, under the complaint, it was not obvious whether it would be actual fraud or constructive fraud. I take the position that if there is no actual fraud in it, these authorities do govern the situation, and that is the defense that we have, and we move for a nonsuit based upon the failure of plaintiff to produce an existing creditor who is in a position to attack the matter [88]

I am sure your Honor will want to read the deposition possibly before passing on this motion, to determine whether your Honor feels that there is evidence of actual fraud or whether this is a case that consists of violating a statute relating to bulk sales.

The Court: I will have to take time out to read the deposition. I can have you come back at 9:30

tomorrow morning. Or do you want to sit around while I read it? I don't like to read it and just come out and give you a snap judgment.

Mr. Ross: No, your Honor. I will do whatever your Honor prefers.

The Court: I will do it either way. I suggest that we adjourn, and I will read the deposition, and then resume at either 9:30 or 10:00 o'clock tomorrow.

Mr. Tobin: Would 10:00 o'clock be agreeable, your Honor?

The Court: It makes no difference to us. We are here all the time.

Mr. Ross: May it please the court, in fairness to counsel and yourself, I would like to indicate that we are not going to put on a defense.

The Court: I take it so.

Do you want to make it 10:00 o'clock?

Mr. Ross: 10:00 o'clock is agreeable, your Honor.

The Court: I have to rule on the motion [89] first.

Mr. Ross: Yes.

The Court: So I have to read the deposition.

Mr. Ross: Yes.

The Court: I will have you return at 10:00 o'clock tomorrow morning.

Mr. Ross: That is agreeable.

The Court: All right. That is all I can do.

The witness may be excused. In other words, Mr. Autrey doesn't need to return.

Mr. Ross: No, there is no reason.

The Court: All right. I will take the deposition and read it and see you gentlemen tomorrow at 10:00 o'clock.

Mr. Ross: Yes, your Honor.

Mr. Tobin: Yes, your Honor.

(Thereupon, at 4:30 p.m., an adjournment was taken until Thursday, January 12, 1956, at 10:00 a.m.)

The Clerk: Case No. 1734-TC Civil, Frank M. Chichester v. Autrey Brothers, Inc., and others.

The Court: I have read the deposition, and I had in mind taking the case under submission when I finished, and I thought I would deny your motion for nonsuit at this time.

Mr. Ross: Yes, your Honor.

For the formal record——

The Court: I understood you to say you were not going to offer any testimony.

Mr. Ross: No, your Honor.

The Court: You have briefed the matter before. Do you want to make any oral argument or do you want to submit the matter at this time?

Mr. Ross: I just wanted to add one thing, your Honor.

The Court: I will hear from both counsel, if they want to add anything. But there will be no more testimony taken; was that your thought?

Mr. Ross: Yes, that was my thought.

I am not a believer in extensive oral argument. I have made our position clear as far as the law is

concerned, but I missed one or two points I would like to point out.

The Court: Yes.

Mr. Ross: Stella Autrey is a party defendant to these [91] proceedings. Now, the evidence before your Honor indicates only that she was an officer and director of Autrey Brothers, Inc., the corporation involved. It completely negatives any participation by Mrs. Autrey in these two transfers in November of 1953. She was not an actor, and that is borne out both by the testimony of Vernon, who testified here, and the deposition to which we offered objection but which has been received in evidence.

The Court: Yes, the deposition of Buster.

Mr. Ross: Yes.

As far as Buster is concerned, your Honor, it doesn't show that he received these stores. The test, of course, is, who got the benefit of the transfer? And Autrey Brothers, a corporation, received those stores and operated them.

In other words, my point is, while I am not in any way relinquishing the ground I have taken on my legal theory, that if your Honor does conclude judgment should be for the plaintiff, I don't believe under any circumstances the judgment should be against Stella, because she was not a participant in any way, Buster did not individually benefit; but the judgment should be against the two corporations: Autrey Brothers, Inc., a corporation, and Sleep E-Z Mattress, Inc., a corporation.

I still feel as I indicated before, and I am not going to reargue the matter, that there is an absence

of proof of [92] actual fraud; that there is here merely a situation of violating Section 3440; and the evidence is perfectly clear from the Times that they had received an amount equivalent to the amount that was due at the time of the transfer, between the date of the transfer and the period of bankruptcy.

We have both searched the books back and forth to try to find a decision from the Circuit raising this point. I have found none. I am sure Mr. Tobin would have been yelling from the housetops if he found one. So we have relied on Section 1479 and the cases we have cited thereunder.

That is all I have to say, your Honor.

The Court: Mr. Tobin.

Mr. Tobin: If your Honor please, a corporation acts only through its officers and directors; and in this case we have joint tort feasons, at least the corporation and Buster Autrey. Buster Autrey was the man who engineered this first transfer from the bankrupt corporation to Autrey Brothers, Inc. Then, after the suit was filed, he organizes this other Autrey Brothers or Sleep E-Z Mattress, which he and his wife own and control completely. Then, after his deposition was taken, he took this dormant corporation he had organized and made a second transfer right in the face of this lawsuit here to a corporation owned and controlled entirely by himself and his wife, and the testimony here [93] indicates that there has been a third transfer

made from this second corporation, and we had to make a motion before Judge Byrne to join as a party defendant, and it was made to the CAC, and the CAC finds itself in bankruptcy.

Now, we are really only beginning this litigation, if your Honor please, if the court renders judgment in favor of the plaintiff, because we have the CAC in bankruptcy down here before the referee. These people have been like the Irishman, all the way through: They have just kept one hop ahead of the trustee in bankruptcy of Veraco, Inc. And we feel that the court, exercising its equitable powers or equitable jurisdiction, can follow this property as far as possible.

I don't know what we are going to have to do if we get a judgment against these people for the value of this property. We have to file a suit or a claim in the CAC bankruptcy and then establish before the referee in bankruptcy that this judgment was actually an attempt to follow thousands of dollars worth of property that went out of Veraco to Autrey Brothers, Inc., and Vernon Autrey and Stella Autrey, the sole owners of that corporation, and then from there to Sleep E-Z Mattress Company, and then from there to CAC, and establish a claim in the Bankruptcy Court to try to get a dividend for the defrauded creditors in this case.

Now, as far as the Times-Mirror claim is concerned, I [94] have in mind the case of *Brainard v. Cohn*, 8 Federal (2d)—I don't remember the exact page, but it about page 7 or 8. In that case, there were a number of fraudulent transfers engineered in

San Francisco to several different people, and the trustee in bankruptcy filed a suit against seven or eight defendants up there in the United States District Court, and among the allegations were the same as we have alleged here: That these transfers were made with intent to hinder, delay, or defraud the creditors; that pursuant to said scheme and device that Section 3440 of the Civil Code was completely ignored and that no bulk sales notices were filed, and that the transfers were made with intent to hinder, delay, or defraud the creditors. The matter was referred to a master for trial, and the master rendered recommendations against each individual for the amount of merchandise actually received by that defendant, on the theory that the defendants were joint tortfeasors. The District Court sustained exceptions to the master's findings and rendered judgment individually for each amount of merchandise that was given to each defendant.

The trustee took an appeal to the Ninth Circuit in that case. The Ninth Circuit reversed the District Court and held that they were joint tortfeasors, and, as such, each and every party to the scheme was liable for the full amount of the loss [95] sustained.

That comes as close as anything that I know of to using Section 3440 as part of a scheme to defraud creditors. It is true that transfers without change of possession, failure to record a bulk sales notice, or other omissions under Section 3440, standing alone, are merely constructive fraud. But here we have acts on the part of these defendants that indi-

cate a clear intention to put this property out of reach of the creditors of Veraco, Inc., for the benefit of Buster Autrey and Stella Autrey, and as fast they could they ground out corporation charters and formed new corporations and just made another transfer, and there is no way in the world a person can pursue them except by a sweeping judgment.

We respectfully submit, if your Honor please, that the trustee is entitled to the judgment asked for.

Mr. Ross: If it please your Honor and Mr. Tobin, in the first place, on this joint tortfeasor situation, who is the tortfeasor in this November, 1953, situation? It is, of course, Autrey Brothers, Inc., the corporation, who received this.

Now, who acted for that corporation at that time? It was Buster Autrey and not Stella Autrey.

Your Honor is quite familiar with these tax situations where the Internal Revenue Code places a liability on officers and directors of corporations for taxes that are not paid. Even under those situations, an inactive, nonparticipating [96] officer or director is not liable for the acts of the corporation. It is only where the officer was used and was under a duty to do certain things.

In this case, the record is devoid of any activity or participation by Stella Autrey.

Now, counsel has presented a better argument than the evidence before your Honor indicates here. The evidence before your Honor is rather thin on

the situation. The evidence indicates that in November, 1953, Buster Autrey claimed that Vernon or Veraco was indebted to him in a large sum of money. They have meetings, at which they are both represented by attorneys, and Mr. Vernon Autrey testified here in court that he, in good faith, believed he was indebted to Autrey Brothers or to his brother at the time these transfers were made.

Now, Buster's testimony also indicates that it was his understanding that his brother was indebted to him.

I don't see that there is any inference deducible from that of any intent to hinder, delay, or defraud creditors. I think the most your Honor has in front of him, from the evidence, is a case of constructive fraud, by virtue of a violation of Section 3440, and even if your Honor does find there is actual fraud, obviously Stella Autrey is in no way involved.

The Court: I will take the matter under [97] submission.

Mr. Ross: Thank you, your Honor.

Mr. Tobin: If your Honor please, in order to complete the record, there being no evidence offered in behalf of the defendants and cross-complainants on the counterclaim, we move to dismiss the counterclaim.

Mr. Ross: No objection to that.

The Court: All right. The counterclaim will be dismissed at this time.

I will take the matter under submission.

Mr. Tobin: Thank you.

Reporter's Certificate

I hereby certify that I am duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on January 11 and 12, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of March, A.D. 1956.

/s/ JOHN SWODER,
Official Reporter.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 91, contain the original:

Debtor's Petition;
Orders of Adjudication;
Order Approving Trustee's Bond;
Complaint;
Answer to Complaint & Counterclaim;

Order Authorizing Joining of Additional Party;

Amended & Supplemental Complaint;

Answer to Amended & Supplemental Complaint;

Order Approving Trustee's Additional Bond;

Judgment & Decree for Plaintiff on Plaintiff's Amended and Supplemental Complaint;

Notice of Appeal;

Appellant's Designation of Contents of Record on Appeal;

Notice of Entry of Judgment;

Appellee's Counter-Designation of Parts of Record on Appeal;

which, together with a full, true and correct copy of the Trustee's Bond and Trustee's Additional Bond; and Plaintiff's exhibits 1A & B and 2; and 1 volume of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 2nd day of April, 1956.

[Seal]

JOHN A. CHILDRESS,

Clerk,

By /s/ CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15093. United States Court of Appeals for the Ninth Circuit. Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., a Corporation, Appellant, vs. Frank M. Chichester, as Trustee in Bankruptcy for the Estate of Veraco, Inc., Doing Business as Airst Mattress Co., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 4, 1956.

Docketed: April 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15093

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Air-est Mattress Co., Bankrupt,

Appellee,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY,
STELLA AUTREY and SLEEP E-Z MATTRESS CO., a California Corporation,

Appellants.

APPELLANTS' STATEMENT OF POINTS TO
BE RELIED UPON AND DESIGNATION
OF RECORD MATERIAL TO THE AP-
PEAL

Come now appellants in the above-entitled matter and they do hereby state that the following are the points upon which they intend to rely in the prosecution of said appeal:

(a) That the Trial Court improperly held that subsequent creditors were protected by a violation of the Bulk Sales Statutes in California, Oregon, Washington and Utah.

(b) That the Trial Court erred in holding that the Times-Mirror Corporation was an existing creditor, existing both at the time of the alleged fraudu-

lent conveyances in violation of the Bulk Sales Statutes and also, an existing creditor at the time of the adjudication in bankruptcy of Veraco, Inc.

(c) That the Trial Court erred in finding that the Times-Mirror Company had not been fully paid the amount of its claim between the date of the alleged transfers in violation of the Bulk Sales Laws and the date of the adjudication in bankruptcy of Veraco, Inc.

(d) That there was no evidence to support finding of the Trial Court that the transfers complained of were actually fraudulent and that a finding in that regard is contrary to the evidence.

(e) That the Court erred in receiving in evidence plaintiff's Exhibit No. 2, being the deposition of appellant Lewis Autrey, having been taken on December 22, 1954 and January 6, 1955.

That appellants designate the following parts of the record as being material and necessary for the consideration of the appeal herein:

(a) Phonographic transcript of the Trial Court, consisting of 98 pages.

(b) Plaintiff's Complaint.

(c) Answer to complaint and counter-claim.

(d) Plaintiff's amended and supplemental complaint.

(e) Order for filing amended and supplemental complaint.

(f) Answer to amended and supplemental complaint.

- (g) Judgment and decree for plaintiff on plaintiff's amended and supplemental complaint.
- (h) Notice of appeal filed herein.
- (i) This designation.

Respectfully submitted,

/s/ BERTRAM H. ROSS,
Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed April 9, 1956.

No. 15093.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS Co., a corporation,
Appellants,

vs.

FRANK M. CHICHESTER, as Trustee in Bankruptcy for
The Estate of Veraco, Inc., doing business as Airst
Mattress Co., Bankrupt,
Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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Los Angeles 13, California,
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FILED

AUG 16 1956

PAUL P. O'BRIEN, CLERK

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Appellants,

vs.

FRANK M. CHICHESTER, as Trustee in Bankruptcy for The Estate of Veraco, Inc., doing business as Airst Mattress Co., Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

Introduction.

This is an appeal by all defendants from a judgment of the United States District Court for the Southern District of California in the sum of \$86,315.62 awarded a Trustee in Bankruptcy arising out of certain alleged violations of bulk sales laws, fraudulent conveyances and exemplary damages. The amount of actual damages as found by the Trial Court was \$76,315.62 and the additional award of \$10,000.00 was for exemplary damages. While all of the defendants below are appellants in this proceeding, special emphasis in this brief will be placed on the positions taken by Lewis Autrey and Stella Autrey.

Jurisdiction of the Court Below and Jurisdiction in This Court.

The jurisdiction of the Court below is fixed by Section 70 of the Bankruptcy Act (11 U. S. C. A. 110).

The jurisdiction of this Court is fixed by 28 U. S. C. A. 1291 and further, by Section 24 of the Bankruptcy Act (11 U. S. C. A. 47).

Sauve v. More Investment Co., 248 Fed. 642;

Stelling v. Jones Lumber Co., 116 Fed. 261.

Statement of Facts.

In order to understand the characters in this litigation, it should be noted that the appellant Lewis B. Autrey has been referred to in the record on many occasions as Buster Autrey. Lewis B. Autrey and Buster Autrey are one and the same person. Vernon Autrey is a brother of Buster Autrey and Vernon Autrey was the moving head of Veraco, Inc., the bankrupt corporation of which appellee is the trustee in bankruptcy. There are two other Autrey brothers whose names will appear from time to time in the record although they are not active participants in the factual situation upon which this litigation is grounded: they are Floyd Autrey and Eugene Autrey. Stella Autrey is the wife of Lewis Autrey.

Upon the adjudication in bankruptcy of Verco, Inc., on August 10, 1954, Frank M. Chichester, the appellee, became trustee of said bankrupt corporation. In the course of his investigation, he ascertained that in November of 1953, Veraco, Inc., had transferred certain of its retail stores in California, Utah, Oregon and Washington to Autrey Brothers, Inc., a California corporation. It was

stipulated and established that so far as the transfers of these stores were concerned that there was no compliance with the bulk sales laws of the respective states involved. [Tr. of Rec. p. 81.]

The Pleadings.

In the complaint, upon which the judgment appealed from is grounded, it was alleged that Times-Mirror Company of Los Angeles, California, was an existing creditor of Veraco, Inc., as of the date of the alleged transfers, as well as at the date of the adjudication in bankruptcy of Veraco, Inc. The first four causes of action set forth in appellee's complaint constitute separate statements of the individual transfers made in violation of the bulk sales statutes of the respective states involved. The fifth cause of action alleged that the transfers alleged in the first four causes of action rendered Veraco, Inc., insolvent. The sixth cause of action alleged that the transfers were fraudulent in fact as well as violative of the various bulk sales statutes.

The answer of the defendants placed in issue the material allegations of the complaint.

Sometime after the filing of the original action, an amended and supplemental complaint was filed seeking exemplary damages in that it alleged that after the filing of the original complaint, there had been a further transfer of the assets in question to the appellant Sleep E-Z Mattress Co., Inc., a California corporation. The answer to the amended and supplemental complaint placed in issue the material allegations of that pleading.

The Evidence.

The evidence, without contradiction, establishes that the Times-Mirror Company, the only creditor whose claim was used by appellee to establish his position as a creditor armed with process, reveals that more was paid to Times-Mirror Company between the date of the alleged fraudulent conveyances and the date of the adjudication of Veraco, Inc., than had been owed to the Times-Mirror Company on any of its accounts as of the date of the alleged fraudulent conveyances. [Tr. of Rec. pp. 90-91.] The evidence is also without contradiction to the effect that no special application was made of the funds as they were received, but the account of Veraco, Inc., was merely credited as a running account. [Tr. of Rec. p. 96.]

Appellee then called Vernon W. Autrey as a witness. Mr. Autrey did not want to testify, but was required to do so by the Court. [Tr. of Rec. pp. 97-98.] Without laboring the point as to whether the Court had a right to require Vernon Autrey to testify against his brother, his testimony indicated that he was the president of Veraco, Inc., a California corporation, from June, 1952, to the date of bankruptcy, August 10, 1953; that Lewis Autrey was his brother and that Stella Autrey was Lewis Autrey's wife. The testimony also indicates that Autrey Brothers, Inc., was operated by Lewis Autrey and constituted a manufacturing concern of bedding and mattresses and that Veraco, Inc., was a distributing company which purchased mattresses from Autrey Brothers, Inc., and sold the same through their own retail outlets. That prior to the transfers involved, the retail outlets belonged to Verco, Inc., but were transferred at the insistence of Lewis Autrey to Autrey Brothers, Inc. The witness testified that his brother had threatened him to some extent concerning an

indebtedness from Veraco, Inc., to Autrey Brothers, Inc., and that it was based upon those threats and said alleged indebtedness that the transfers were made. The record is completely clear to the effect that at the time of the transfer of the stores that Vernon Autrey honestly believed that he was indebted to Autrey Brothers, Inc., in a sum of money and it further appears, without contradiction, that at the time of the alleged transfers that both Vernon Autrey and Lewis Autrey were represented by counsel and that no force was used, that no weapons were used and that the transfers were made by Vernon Autrey as president of Veraco, Inc., on the belief that he was indebted to Autrey Brothers, Inc., in the amount claimed. [Tr. of Rec. pp. 146-147; *cf.* p. 101.]

Lewis Autrey had not been called as a witness, nor had he been subpoenaed by appellee. During the course of the discovery process prior to trial, a partial deposition of Lewis Autrey had been taken. The deposition had never been completed nor had it ever been signed or sworn to by Lewis Autrey. The record also indicates that appellee had never taken any steps to use the process of the Court to complete the deposition and have it signed and sworn to. The appellee offered the deposition in evidence at the time of trial to which strenuous objections and motions to suppress were made which were overruled by the Court. Over the objections of appellants, the deposition was received in evidence and considered by the Court. While we do not feel that the deposition establishes actual fraud, it is obvious that the record, without the deposition, is completely devoid of evidence of actual fraud. The deposition was not printed as a part of the record, but a request was filed to send the deposition up as an exhibit and we respectfully request the Court to examine the deposition.

Summary of Argument.

We propose to argue the following points of law :

1. THAT THE TIMES-MIRROR PUBLISHING COMPANY WAS NOT AN EXISTING CREDITOR WITHIN THE MEANING OF THE DECISIONS TO ENTITLE THE TRUSTEE TO THE RELIEF HE SOUGHT;
2. THAT SUBSEQUENT CREDITORS ARE NOT PROTECTED BY A VIOLATION OF THE BULK SALES LAWS;
3. THAT THE TRIAL COURT ERRED IN RECEIVING IN EVIDENCE THE INCOMPLETE DEPOSITION OF LEWIS AUTREY;
4. THAT THERE WAS AN INSUFFICIENCY OF EVIDENCE TO ESTABLISH ACTUAL FRAUD;
5. THAT THERE IS A COMPLETE FAILURE OF EVIDENCE TO ESTABLISH ANY LIABILITY OR CULPABILITY ON THE PART OF STELLA AUTREY, WIFE OF LEWIS B. AUTREY; THE EVIDENCE MERELY INDICATES SHE WAS AN OFFICER AND DIRECTOR OF AUTREY BROTHERS, INC., BUT IS DEVOID OF INDICATING ANY EVIDENCE THAT SHE IN ANY WAY PARTICIPATED IN THE ACTS COMPLAINED OF BY APPELLEE.

ARGUMENT.

1. That the Times-Mirror Publishing Company Was Not an Existing Creditor Within the Meaning of the Decisions to Entitle the Trustee to the Relief He Sought.

For the purpose of setting aside conveyances in violation of bulk sales statutes, the trustee in bankruptcy is a creditor armed with process, but in order to obtain this position, the trustee must find a creditor who was a creditor both at the time of the alleged conveyance in violation of the bulk sales statute and at the time of debtors adjudication in bankruptcy.

Moore v. Bay, 284 U. S. 4, 76 L. Ed. 133.

Bearing in mind the law on the subject, as established in *Moore v. Bay*, *supra*, the record indicates that the alleged fraudulent conveyances occurred in November, 1953, and that Veraco, Inc., was adjudicated a bankrupt in August of 1954. The advertising for which the indebtedness was created was published both in the Los Angeles Times and in the Mirror, both of which publications are owned by the Times-Mirror Company. The ledger sheets of the creditor introduced in evidence, indicate that Veraco, Inc., had fully paid the amount that was due as of the date of the alleged fraudulent conveyances long prior to the date of adjudication in bankruptcy. [Tr. of Rec. pp. 87, 90, 96.] Appellee has not produced "an existing creditor" within the meaning of Section 3440 of the Civil Code of the State of California or the bulk sales statutes of the other states involved in this transaction. There is a vast

difference between setting aside a fraudulent transaction for a violation of the bulk sales statutes and setting aside a fraudulent transaction based upon actual fraud.

Kirk and White Company v. Bieg-Hoffine Co., 6 Cal. App. 2d 188, 44 P. 2d 430;

Daniels v. Pacific Brewing and Malting Company, 86 Wash. 416, 150 Pac. 609;

Oregon Mill and Grain Company v. Hyde, 87 Ore. 163, 169 Pac. 791.

The Nature of a Running Account.

The Court will recall that the testimony was to the effect that the Times-Mirror Company treated the payments made as payments on a running account and made no special application of the funds as received. [Tr. of Rec. p. 96.] California Civil Code, Section 1479, provides that in the absence of an agreement as to the application of the payments, the payments must be applied in extinction of the obligations earliest in date.

Hollywood Wholesale Electric Company v. Baskin, Inc., 121 Cal. App. 2d 415, 263 P. 2d 665;

Standard Pipe v. Red Rock Company, 57 Cal. App. 2d 897.

It will thus be evident that the Times-Mirror Company, the creditor produced by the appellee, was not "an existing creditor" within the meaning of the bulk sales laws to invest the trustee with jurisdiction to set aside the transfers. Such a creditor must be produced to place the trustee in the position of a creditor armed with process. (*Moore v. Bay, supra.*)

2. That Subsequent Creditors Are Not Protected by a Violation of the Bulk Sales Laws.

In that appellee only offered evidence as to the Times-Mirror Company, it is only fair to state that the evidence and ledger sheets received indicate that Times-Mirror Company was a subsequent creditor, having extended credit after the alleged conveyances in violation of the bulk sales statute. It requires very little argument to demonstrate that subsequent creditors are not protected by the bulk sales statutes.

Dodd v. Ranes, 1 F. 2d 658;

Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280;

Braun v. American Laundry and Machinery Co.,
56 F. 2d 197;

Apex Leasing Company v. Litke, 159 N. Y. Supp.
707, 173 App. Div. 323.

It now becomes evident that appellee has failed to make a case out under his first four causes of action, which are grounded upon a violation of the bulk sales statutes, leaving the question to be determined as to whether there was proof of actual fraud to support the judgment.

3. That the Trial Court Erred in Receiving in Evidence the Incomplete Deposition of Lewis Autrey.

At the time of trial appellee produced as a witness, the reporter before whom the deposition of Lewis B. Autrey was taken [Tr. of Rec. p. 125] and upon offering the deposition in evidence, appellants moved to suppress the deposition on all of the grounds legally available [Tr. of Rec. p. 127] and despite said objections, the Court received the deposition in evidence. [Tr. of Rec. pp. 131-132.]

The record clearly shows that the deposition was never submitted to the witness for his signature nor was the deposition certified by the officer, nor was the deposition ever filed, all of which are required by Rule 30 of the Rules of Civil Procedure.

The motion to suppress was based upon the provisions of Rule 32(d) of the Rules of Civil Procedure, in that appellants had no knowledge that any attempt would be made to use the incomplete, unfiled and uncertified instrument until it was actually produced in court, at which time, the motion to suppress was made and denied, as set forth.

It is our position that the motion should have been granted and that the Court should not have read and considered the deposition, nor received it in evidence as an exhibit.

Breese v. Tampex Sales Corp., 102 F. 2d 808.

In *Thomas v. Black*, 84 Cal. 221 at 225, 226, 23 Pac. 1037, 1038, the Court stated:

“The testimony of the witnesses . . . was improperly admitted. . . . The testimony of the two witnesses was then taken by the shorthand reporter, but was not read over to the witnesses, or corrected or signed by them. On the trial of the case, . . . a transcript of this testimony, or what purported to be such a transcript, but not certified by the reporter or by any other person, was offered in evidence, and admitted over plaintiff’s objections that it had not been read to the witnesses, nor subscribed by them, nor certified by the officer taking the depositions, as required by the code, nor certified by the reporter as a correct transcript of his notes. . . . In the case at bar the transcript admitted in evidence lacked the essential elements of a ‘deposition’ as defined by the

code. It was not certified or authenticated in any way whatever, and the witnesses had no opportunity to correct it. The jury before whom the case was afterward tried did not see the witnesses, . . . we can see no tenable ground upon which the document could have been admitted. . . .”

To the same effect are:

Bennett v. Superior Court, 99 Cal. App. 2d 585, 222 P. 2d 276;

Beckman v. Waters, 161 Cal. 581, 119 Pac. 922.

We do not question for a moment that had Lewis B. Autrey been placed on the witness stand at the trial of this action, that the incomplete deposition could have been used for the purposes of impeachment. It was not offered for that purpose, but was offered and received as a deposition of Lewis B. Autrey and in view of the fact that the record is completely devoid of any testimony of actual fraud, it must be assumed that the Court drew the inferences of fraud from this improperly admitted deposition and for that reason, the error of law committed by the Trial Court was both substantial and prejudicial to appellants.

4. That There Was an Insufficiency of Evidence to Establish Actual Fraud.

We have fully covered this subject in our statement of facts. Lewis B. Autrey was not brought before the Court by either party and the only evidence that the Court received from Lewis B. Autry was the improperly admitted deposition. We have requested that the same be brought up with the other exhibits and we are sure that the Court will find nothing in the improperly admitted deposition to ground a finding of actual fraud.

Likewise, in perusing the testimony of Vernon Autrey, it appeared that his intentions are clear from his testimony. At the time the transfers were made from Veraco, Inc., Vernon Autrey was under the honest belief that he was indebted or at least that Veraco, Inc., was indebted to Autrey Brothers, Inc. [Tr. of Rec. pp. 146-147.] Despite the testimony concerning threats, fear and the like, the evidence is without conflict to the effect that both Vernon Autrey and Buster Autrey were represented by counsel of their own choosing and that no force of any kind was used to accomplish the transfers. In fact the record indicates that the transfers were made on two separate occasions and it is difficult to understand that the transfers were other than freely and voluntarily made and it is also obvious that the intent and motive of Vernon Autrey was to pay out what he believed to be a financial obligation of Veraco, Inc. [Tr. of Rec. p. 147.]

5. That There Is a Complete Failure of Evidence to Establish Any Liability or Culpability on the Part of Stella Autrey, Wife of Lewis B. Autrey; the Evidence Merely Indicates She Was an Officer and Director of Autrey Brothers, Inc., but Is Devoid of Indicating Any Evidence That She in Any Way Participated in the Acts Complained of by Appellee.

A careful examination of the entire transcript will reveal that the only evidence connecting Stella Autrey with the transactions here in question appears to be that she was an officer and director of Autrey Brothers, Inc., a corporation. Assuming, for the purpose of argument, without admitting it to be a fact, that a wrong was committed, it certainly would appear that Stella Autrey was not a participant or actor in the transaction. The record does

not show that she was present at the time the transactions complained of occurred, nor did she in any way act for or on behalf of the corporation.

Let us look at the record in this regard and it will be found in the Transcript of Record, at page 101, that the following questions were asked of Vernon Autrey and the following answers given:

“Q. Yes, who were present at the time the transfer took place? A. Myself and attorney for myself, a Mr. Silver, and Mr. Schekman and Lewis B. Autrey and Harry Traub, and it seems like brother Floyd Autrey was there at the time.” [See, also, Tr. of Rec. p. 147.]

The foregoing constitutes all of the testimony on the record establishing the participants in both allegedly fraudulent transfers.

We feel that it is a fair statement of law to assert that directors, officers and agents of a corporation are not liable for corporate acts or for acts committed by other directors, officers or agents, simply by reason of their official relationship to the corporation.

There is no question that a director, officer or agent of a corporation who commits a tort is jointly personally liable along with the corporation for such tort.

O'Connell v. Union Drilling and Petroleum Co.,
121 Cal. App. 302, 8 P. 2d 867;

Thomsen v. Culver City Motors, Inc., 4 Cal. App.
2d 639, 41 P. 2d 597;

Mears v. Crocker First National Bank, 84 Cal.
App. 2d 637, 191 P. 2d 501.

The law is entirely clear to the effect that an officer or director who does not participate in the wrongful act and is guilty of no culpable negligence in permitting it, may not be held liable for a corporate tort simply by reason of his official relationship to the corporation.

Thomsen v. Culver City Motors, Inc., 4 Cal. App. 2d 639, 41 P. 2d 597.

The record does not indicate and in fact completely negatives any act or participation by Stella Autrey in either of the two alleged fraudulent transfers made in November, 1953. Further, it fails to indicate that she was at fault in the performance of her duties as a director or officer.

“The authorities are uniform in holding nonparticipants immune from liability . . .”

O'Connell v. Union Drilling and Petroleum Co., 121 Cal. App. 302, at 309, 8 P. 2d 867, at 870.

It was further aptly stated in *Thomsen v. Culver City Motors, Inc.*, 4 Cal. App. 2d 639, at pp. at 644 and 645; 41 P. 2d 597 at 600:

“While it is true, of course, that directors and officers of a corporation are liable equally with the corporation for its torts in which they participate, it is equally true that if they do not participate therein, and if they are guilty of no culpable negligence in allowing the commission of the wrongful acts, they are not liable.”

The record in this case merely establishes that Stella Autrey was a director and officer of the corporation. This

matter was brought to the attention of the Trial Court [Tr. of Rec. p. 159] and we think, of course, that any holding as to Stella Autrey is beyond the purview of a reasonable interpretation of the statutes and decisions in such cases made and provided.

Conclusion.

It is respectfully submitted that for the reasons stated that the judgment as to all appellants should be reversed and that the costs of this appeal should be taxed against appellee.

BERTRAM H. ROSS,

Attorney for Appellants.

No. 15093

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AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS Co., a corporation,
Appellants,

vs.

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., doing business as Airst Mattress Co., Bankrupt,
Appellee.

BRIEF OF APPELLEE.

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FILE

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PAUL P. O'BRIEN, CL

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FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., doing business as Airst Mattress Co., Bankrupt,
Appellee.

BRIEF OF APPELLEE.

The appeal in this case is taken by all of the defendants from a decree of Honorable Thurmond Clarke, United States District Judge for the Southern District of California, assessing a money judgment against them in the sum of \$86,315.62 actual and exemplary damages, as a result of a fraudulent scheme carried out by them. whereby the bankrupt estate was defrauded out of \$76,315.62 worth of merchandise through the machinations of the defendants, individual or corporate, all of whom are very closely related. The court, in addition to the actual damages, assessed exemplary damages in the sum of \$10,000.00 against them. (Civ. Code of Calif., Sec. 3294.)

A review of the background of this malodorous case we believe should satisfy this court that Judge Clarke was more than justified in his disposition of it. The plaintiff, Frank M. Chichester, is trustee in bankruptcy for the estate of Veraco, Inc. The schedules which were received in evidence by reference [Tr. p. 139] show huge liabilities amounting to \$132,271.01. [Tr. p. 138.] The assets, at the bankrupt's own valuation, only amounted to \$59,000.00 at the date of bankruptcy. [Tr. p. 140.] For some reason or other unknown to us, the defendants who were originally represented by Zeman, Hertzberg & Schekman, in their Answer in allegation No. VIII [Tr. p. 38], denied that the plaintiff was the duly alleged, qualified and acting trustee in bankruptcy for the estate of Veraco, Inc. This specious denial was overcome by our offer in evidence of the Order Approving the Trustee's Bond in the bankruptcy proceeding, its receipt thereby by the court with no objection on the part of Mr. Ross who represented the defendant at the trial. [Tr. p. 149.]

Insofar as the defendants are concerned, they are nothing more nor less than the Autrey family, all working together to defraud the creditors of Veraco, Inc., bankrupt, which had been controlled by Vernon W. Autrey. At the time the action was instituted on October 18, 1954, the trustee had uncovered the fact that in the month of November, 1953, the bankrupt, Veraco, Inc., had transferred entire stocks of merchandise in retail stores at Los Angeles, Bellflower and El Monte, in the State of California, another stock located in Salt Lake City, Utah, and two more stocks located in Portland, Oregon, and Seattle and Tacoma, Washington, to the defendant, Autrey Brothers, a corporation owned and controlled by the defendants, Lewis Autrey and Stella Autrey, husband and wife.

A suit was filed on October 18, 1954, to recover this merchandise. (See plaintiff's original complaint, pp. 3-35, inclusive.)

The Bulk Sales Laws of the various States in which these stocks were located were completely ignored by Vernon Autrey, controlling Veraco, Inc., and his brother and sister-in-law and their corporation, Autrey Brothers, Inc. The trustee alleged in his complaint that the transfers were brought about as a result of Lewis Autrey charging his brother, Vernon Autrey, with misappropriating or diverting the sum of \$95,000.00 which he claimed was due the defendants, Autrey Brothers, and threatening him with criminal prosecution unless he turned the stores over to the defendant, Autrey Brothers, Inc. [Allegation No. V, Tr. p. 20.] The trustee also alleged that the transfers were effectuated with the intent and purpose on the part of the defendants, to hinder, delay or defraud both existing and future creditors of Veraco. [See Allegation No. VIII, p. 22.]

The defendants, through their attorneys Zeman, Hertzberg & Schekman, filed their answer to the complaint and as Exhibits "A" and "B" attached thereto, set out *totidem verbis* the memorandum agreements whereby these fraudulent conveyances were accomplished. These are found in the record as Exhibit "A" [Tr. p. 56] and Exhibit "B." [Tr. p. 58.] The answer was filed December 6, 1954. [Tr. p. 60.] Zeman, Hertzberg & Schekman were then acting as attorneys for the defendants.

Pursuant to the Federal Rules of Federal Procedure relating to "discovery" the plaintiff procured a *subpoena duces tecum* requiring the defendant, Lewis Buster Autrey, to produce an alleged Consignment Agreement he claimed to have, which would take the transfers of these stocks

out of the operations of the Bulk Sales Laws of the various States where these retail outlets were situated, in the deposition to be taken December 22, 1954, pursuant to notice to defendants. Autrey appeared at the taking of the deposition before Louis Sommers, a notary public at the office of counsel for the plaintiff accompanied by Harrison W. Hertzberg, one of the attorneys for the defendants. He did not bring the Consignment Agreement with him, Fifty-one pages of testimony were taken on December 22, 1954, and the deposition was adjourned to Thursday, January 6, 1955, at the same place.

When the deposition was resumed on January 6, 1955, an amazing situation came to light.

In October, 1954, the month the lawsuit was started against Autrey Brothers, Inc., Autrey had incorporated another corporation known as Sleep E-Z Mattress Co. [See Pltf. Ex. 2, p. 65.] This corporation was a mere shell, having no assets. [Pltf. Ex. 2, p. 69, lines 7-13.] The defendant, Lewis Buster Autrey, was president of this new corporation, one Robert Willey was vice-president, and the defendant, Stella Autrey, was secretary and treasurer of the new corporation. The stock in this new corporation was owned by Lewis Buster Autrey. [Pltf. Ex. 2, p. 62, lines 1-2.] On January 1, 1955, five days before the resumption of the taking of Buster Autrey's deposition, the assets that the trustee was seeking to pursue, were again transferred from Autrey Brothers, or Lewis Buster Autrey, to the corporation known as Sleep E-Z Mattress, owned and controlled by the defendants, Lewis Buster Autrey and Stella Autrey, his wife. [See Pltf. Ex. 2, p. 62, lines 1-10, and p. 69, line 7, to p. 70, line 5, incl.]

The deposition was concluded after these facts had been brought to light and a stipulation entered into that the deposition could be signed before any notary. [Pltf. Ex. 2, p. 81.] Nothing more was heard from Lewis Autrey and the deposition was never signed.

After learning of this latest move on the part of the defendants, counsel for the plaintiff, on motion granted, filed an amended and supplemental complaint joining the Sleep E-Z Mattress Co., as an additional party defendant. [Tr. p. 60 *et seq.*] The defendants then changed attorneys and the answer to this amended and supplemental complaint was filed by Mr. Bertram H. Ross, present counsel for the defendants. [Tr. p. 66 *et seq.*]

The case went to trial on January 11, 1956, before Honorable Thurmond Clarke, United States District Judge, and very early in the case it was demonstrated how cleverly the members of the Autrey family were working together to thwart the trustee in his efforts to undo the damage theretofore done by them.

Notwithstanding the fact that they had been sued for a sum total of over \$86,000.00 and had asserted in their answer a counterclaim against the trustee in the sum of \$54,962.28 [Tr. p. 55], neither of the defendants, Lewis Autrey or Stella Autrey, individually, or as officers and directors of the defendant corporations, Autrey Brothers, Inc., and Sleep E-Z Mattress Co., appeared at the trial before Judge Clarke. Very fortunately, the trustee had placed Vernon Autrey, president of the bankrupt corporation, under subpoena. When he was called as a witness for the trustee, notwithstanding the fact that he had theretofore claimed to have been blackmailed out of several retail outlets of Veraco, Inc., by his brother, he attempted to wreck the trustee's case at the very onset of his testi-

mony. After stating his name and address, he was asked if he was an officer of the bankrupt corporation, Veraco, Inc., he answered:

“I would like to refuse to answer any questions today on the grounds that it might incriminate or degrade me in certain matters of different things, and until I have advice from my attorney and have him present.” [Tr. p. 97.]

Judge Clarke overruled the refusal of the witness to state whether he was an officer of the bankrupt corporation on the ground that his answer would tend to incriminate him, and he then proceeded to testify that the bankrupt, Veraco, Inc., was engaged in the retail bedding business and that he was president thereof; that Lewis Autrey was his brother and Stella Autrey his sister-in-law that the defendant Autrey Brothers, Inc., was a California corporation owned and controlled by Lewis B. Autrey and that he, Vernon, operated and controlled the bankrupt, Veraco, Inc. [See Tr. pp. 98-99.] He testified that Autrey Brothers, Inc., manufactured the products and Veraco, Inc., retailed them from its places of business in California, Oregon, Washington, Utah and Arizona.

At pages 100 and 101 of the Transcript he testified to the transfers of these retail outlets to Autrey Brothers, Inc. At page 102 of the Transcript he testified that Lewis B. Autrey had accused him of stealing many thousands of dollars and that he threatened criminal prosecution of Vernon unless four stores were transferred to Autrey Brothers, Inc. The “charge” involved figures ranging from \$50,000.00 to \$200,000.00. [Tr. p. 103.] Being frightened as a result of these vague charges of embezzling from \$50,000.00 to \$200,000.00, the transfer of certain outlets was made, consisting of equipment,

trucks and stock worth \$40,000.00 or \$45,000.00. [Tr. p. 103.] About two weeks later, two more stores were transferred. These stores were located at Seattle, Tacoma and Portland, Oregon, and according to the President of the bankrupt corporation, Vernon W. Autrey, he had undertaken to pay the defendants \$7,000.00 a week, and in lieu of that \$7,000.00 a week, he transferred the Oregon and Washington stores. It has been admitted throughout the entire trial of this case that no attempt was made to comply with the Bulk Sales Law of any of the States wherein these retail outlets were located. It is interesting to note from the testimony of Vernon Autrey at [Tr. pp. 109, *et seq.*] how these stores were maneuvered around from one corporation to another controlled by the Autrey brothers until ultimately a substantial portion of them landed in the hands of the CAC Corporation, now in bankruptcy in Referee Bergner's court in Los Angeles. [Tr. p. 111.] At least half of it got back into Vernon Autrey's hands by circuitous routes. [Tr. pp. 111, 112.]

The various names under which these corporate brothers operated is positively bewildering. Throughout the transcript, including the deposition of Lewis B. Autrey, we encounter the following: Autrey Brothers, Inc. Veraco, Inc., dba Airst Mattress Co., Mattress City at Salt Lake City organized under the laws of the State of Texas [see Tr. p. 109], CAC Corporation, and Airst Mattress Co. [Tr. pp. 151-160.] There were four Autrey brothers engaged in the same business, Floyd Autrey, Lewis B. Autrey, Vernon Autrey and E. T. Autrey. [Tr. p. 112.] The CAC Corporation, which likewise landed in bankruptcy, later, after the stock in Portland, Oregon, had been removed to Seattle, Washington, four or five months before the trial, was owned by the President of Veraco, Inc., Vernon Autrey and Harry Traub, its accountant.

We are satisfied that an examination by this court of the transcript of testimony taken and the exhibits received, particularly the damaging deposition of Lewis B. Autrey, which he did not sign, and studiously stayed away from the trial, will convince this court as it did the trial court that these defendants, and undoubtedly the President of Veraco, Inc., Vernon Autrey, were in a vicious scheme to hinder, delay or defraud all creditors. We are likewise satisfied that the alleged quarrel between Vernon and Lewis B. Autrey was nothing more than a sham battle to raise a smoke screen under which these brothers could maneuver their stocks in trade with bewildering speed similar to the manipulator of a shell game at county fairs of years ago.

The Law.

We believe the first question that will have to be disposed of is whether or not Judge Clarke erred in admitting the unsigned deposition of Lewis B. Autrey. [Pltf. Ex. 2.] As heretofore stated, this deposition was started on December 22, 1954, adjourned after fifty-one pages were taken, and resumed January 6, 1955. During the adjournment, the witness Autrey proceeded to again transfer the property which the trustee was pursuing, to the empty corporation which he had organized at the time the suit was filed. Notwithstanding the fact that his Attorney stipulated that the deposition could be signed before any Notary, Autrey never appeared again either to sign the deposition or to fight the charges against him at the time of the trial. Counsel for the plaintiff, on learning that Autrey was not present at the trial and would not be, proceeded to call Louis Sommers, the court reporter before whom Autrey's deposition had been taken.

[Tr. p. 125 *et seq.*] The full foundation was laid by showing that Autrey had been sworn, that his testimony was taken down in shorthand and correctly transcribed into long hand, and that the deposition was a true and correct transcript thereof. [Tr. pp. 125-131, incl.] That this transcript was admissible despite the objections of present counsel for the defendants is supported by very respectable authority. In the case of *Sampsell v. Anchles*, 108 F. 2d 945, at 955, this court reversed the District Court for the Western District of Washington for erroneously excluding an examination of the defendant, Nathan Anchles, taken under Section 21a of the Bankruptcy Act in the matter of Sam Gold, Bankrupt, which had been offered in evidence in a plenary action, wherein Anchles was a defendant. We quote from the opinion of Judge Wilbur holding that the 21a transcript was admissible:

“Two other points relied upon by appellant will be briefly mentioned. Under point 25 in his brief appellant contends that the court erred in sustaining appellees’ objection to the introduction in evidence of the transcript of the testimony of appellee N. Anchles, taken under Sec. 21, sub. a of the Bankruptcy Act, 11 U. S. C. A. Sec. 44, sub. a. The trial court ruled the evidence out upon the ground that it was in the nature of a deposition and if the witness could be produced in court at the trial, the testimony offered could not be used. This was error. Even if we assume that the proceeding under which the testimony was taken was in the nature of a deposition it was clearly admissible as an admission of a party against interest. As such, it was immaterial whether or not the witness was able to testify or had testified in the action in which he was a party. *Kneezle v. Scott*

County Milling Co., Mo. App., 113 S. W. 2d 817; Cote v. Sears, Roebuck Co., 86 N. H. 238, 166 A. 279; Reilly v. Buster, Tex. Civ. App., 52 S. W. 2d 521; Newby v. Gibson, 6 Cal. App. 2d 359, 44 P. 2d 468. See 22 C. J. 342, Sec. 387; Slattery v. Dillon, 9 Cir., 17 F. 2d 347. Another ground relied upon by the trial court in excluding that evidence was that the transcript consisted of a bound book containing the testimony of other witnesses which, under Washington statutory law (section 308-5, Remington's Revised Statutes of Washington might be taken by the jury to the jury room. All that was offered in evidence was the testimony of N. Anches which counsel offered to read. This was the proper way to adduce the evidence. The evidence consisted of statements of the witness concerning the circumstances under which he made his purchases from the bankrupt. It tended to show that the purchases were not made in good faith and thus was pertinent to the issues in the case."

If there were more justification for admitting this unsigned deposition as an admission against interest on the part of the defendant Autrey and the corporation, we will compare the situation in the two cases. In *Sampsell v. Anches*, the transcript in question was a transcript of an examination under Section 21a in the matter of Sam Gold, bankrupt, conducted in ancillary proceedings in Seattle long prior to the institution of any suit against N. Anches & Son. Anches was examined as a witness in the Gold bankruptcy. He made a number of admissions in this examination which the trustee deemed damaging. Later on, in an independent action filed under Section 70e of the National Bankruptcy Act in the Western District of Washington, the trustee sought to intro-

duce this 21a transcript in evidence against Anches even though Anches was there in the court room and represented by counsel. Upon objection by counsel for the defendants, N. Anches & Son, the objection was sustained, the 21a transcript excluded, and the writer, one of the Attorneys for the plaintiff, denied the right to read the testimony of N. Anches to the jury. This was declared by Judge Wilbur to be error and in his ruling the District Court had gone flatly in the face of a prior holding by this court in the case of *Slattery v. Dillon*, 17 Fed. 2d 347, holding such evidence admissible.

In the case at bar, it is evident from a reading of the deposition in question that the defendant, Lewis B. Autrey, had engaged throughout in every possible subterfuge to avoid giving honest or frank answers to questions propounded to him. With no Judge present to hold him in line, he had evaded, ducked and dodged throughout the entire transcript. When it was completed, he did not sign it. When the case was called for trial, he avoided being called as an adverse witness under the provisions of Section 21j of the National Bankruptcy Act, 11 U. S. C. A., Section 44, Subdivision (a) which provides that in any plenary suit brought under this Act if it shall appear that the interest of the witness is adverse to the party calling him, such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony. If this court was prepared to hold in the *Anches* case (another bare faced fraud) that with Anches present in the court room the trustee had a right to introduce a 21a transcript as part of a substantive case in accordance with the law laid down in *Slattery v. Dillon*, *supra*, certainly Judge Clarke was more than justified in admitting the unsigned deposition of Lewis B.

Autrey as an admission against interest under the rule laid down in *Sampsell v. Anches* and *Slattery v. Dillon*.

That deposition taken on notice to all of the parties at which the defendants were ably represented by Attorney Hertzberg graphically demonstrated the fraud perpetrated by members of the Autrey family against the unfortunate creditors of Veraco, Inc. The facts shown in this deposition and the testimony of Vernon Autrey, brought out after he had attempted to claim a constitutional privilege against self incrimination, demonstrated by clear, convincing evidence a scheme whereby Veraco, Inc., in a matter of hours, had unloaded thousands of dollars worth of merchandise from the bankrupt corporation controlled by Brother Vernon Autrey to another corporation controlled, directed and officered by Brother Lewis Buster Autrey and Sister-in-Law Stella Autrey, and while the deposition was pending incomplete, the latter two had placed the merchandise still further beyond reach by a second quick transfer to Sleep E-Z Mattress, Inc., owned, controlled and dominated by the defendants Lewis B. Autrey and Stella Autrey, his wife, and further, after the commission of the acts complained of in the suit, Lewis B. Autrey and his wife, Stella Autrey, had disposed of their stock in Autrey Brothers, Inc., to one of the other brothers, Eugene Autrey, who had then transferred the stock to one, Alvis Dunbar. [See Tr. Ex. 2, pp. 76, 77.]

After alleging in their verified answer that the merchandise transferred in violation of the Bulk Sales Laws of four States was merchandise that was under consignment, and their promise to produce the alleged Consignment Agreement in the resumed deposition, it developed at [Pltf. Ex. 2, p. 75 *et seq.* of Dep.] that the only alleged consignment agreement between the parties was an

oral agreement claimed to be entered into by Lewis Autrey with Vernon Autrey with the defendant, Stella Autrey, present.

We respectfully submit that the deposition was properly received in evidence, properly considered by the trial court and that the judgment is solidly founded on facts dragged out from the wily Autrey brothers.

The Fact That the Defendants Did Not Appear at the Trial of the Case and Did Not Offer Any Evidence Whatever in Support of Their Contentions Requires an Affirmance of the Judgment of the Lower Court.

Bearing in mind that the machinations involved here are entirely within the Autrey family between Vernon Autrey, holding and controlling the bankrupt Veraco, Inc., and Lewis B. Autrey and his wife, owning and controlling the defendants, Autrey Brothers, Inc., and Sleep E-Z Mattress, Inc., it was at least incumbent on the defendants to produce some testimony in support of the honesty of the transactions between them. As was said by Professor Glenn in his work "The Law of Fraudulent Conveyances" at page 413:

"When the grantee is the debtor's wife or husband, as the case may be, or any member of the household, the circumstance puts a certain duty upon the grantee. It is not a badge of fraud in the sense that a *prima facie* case is made against the grantee by the circumstance alone. But it is an aid to the creditor in that only slight evidence in addition is required for a *prima facie* case. And if, at the close of the whole case, the grantee has not given evidence, or presented good excuse for not taking the stand, the creditor should recover."

As authority for that statement Professor Glenn cites the following authorities: *Seitz v. Mitchell*, 94 U. S. 580; *Jarrard v. Motley* (Ga. 1930), 154 S. E. 253; *Parker v. Fenwick*, 147 N. C. 525, 61 S. E. 378; *Hedrick v. Hockfield*, 283 Fed. 574; *Hutcheson v. Savings Bank, etc.*, 129 Va. 281, 105 S. E. 677; *First Nat. Bank v. Danser*, 70 W. Va. 529, 74 S. E. 623.

In *Seitz v. Mitchell* cited as authority by Professor Glenn, the Supreme Court of the United States said:

“She avers that she paid it with means and money earned and procured wholly by herself. Of that there is no proof, nor attempt to adduce proof; though, if the fact were so, the means of proving it must have been peculiarly within her knowledge and power, and we have already observed that money procured by her earnings belonged to her husband, and was not her separate property. To hold that conveyances thus taken and thus paid for are sufficient to protect the property against creditors of an insolvent husband would be making fraud both profitable and easy.”

The ultimate transferee of these assets, the defendant, Sleep E-Z Mattress Co., owned and controlled by the defendants Lewis B. Autrey and his wife Stella Autrey [Pltf. Ex. 2, pp. 69, 70] had no assets at all when the Autreys proceeded to dump the property the trustee was seeking from Autrey Brothers, Inc., to Sleep E-Z Mattress Co. We quote from Buster Autrey's deposition [Pltf. Ex. 2, p. 69]:

“Q. Isn't it a fact in November of 1954, this corporation, Sleep E-Z Mattress Company, didn't own any assets of any kind or description; just yes or no? I am talking about the corporation, I am not talking about you. A. I don't guess it did. Any assets?

Q. Yes. A. No.

Q. Wasn't that corporation formed for the purpose of putting your business out of your name after this suit was filed? A. No sir.

Q. Who is the president of Sleep EZ Mattress Company? A. I am.

Q. Who is the vice president? A. Robert Willey.

Q. Who is the secretary and treasurer? A. My wife.

Q. Stella Autrey, a defendant here? A. That is right.

Q. To boil the whole thing down then to its ultimate conclusion, since this lawsuit was started you have gotten out of your name everything except your home. Isn't that right? A. It is still in my name. It is mine, and that is it.

Q. You understand you are under oath here? A. Yes.

Q. You mean to say that you have not put everything out of your name except your home since this lawsuit was started? I want your answer under oath. A. We were incorporating. It is the same as if I owned it now. It is the same thing.

Q. You incorporated this corporation in October, didn't you? A. We formed one, yes.

Q. In October, November and December of 1954 that corporation didn't own a thing, did it? A. No. It still doesn't.

Q. Then on January 1, 1955, after your deposition had been partially taken in this case, you transferred the stores to Sleep EZ Mattress, Inc. A. What you are trying to put in my mouth—

Q. I am just asking for the facts. A. The fact of it is, if that is what you want, I am trying to pro-

tect the name Sleep EZ Mattress by incorporating it. I understand that no one else can use the name Sleep EZ Mattress as a company or anything else. I am trying to protect the name Sleep EZ by incorporating. Everything that I own I have in it, except my home, but it is still mine, and it is the same as if I was an individual anyway. If that is hurting your feelings—

Q. You can't hurt my feelings. A. But it makes me no difference.

Q. I just want to get you down here under oath on a few things. A. Because I own nothing anyhow, it is just the creditors' money that you are fighting over. The same ones that I owe, he owed."

We will refer briefly to the law of California where skeleton corporations with little or no financing are involved. In *Carlesimo v. Schwebel*, 87 Cal. App. 2d 482, at page 493, the court said:

"We think the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation. But in such a case it is incumbent upon the one seeking to pierce the corporate veil to show by evidence that the financial setup of the corporation is just a sham, and accomplishes injustice. In the instant case the plaintiff made no such showing. He not only failed to show, as a fact, that the corporation was inadequately financed, but failed to show any casual connection between the financing and the injury."

In the case at bar, we definitely established by the testimony of Lewis Buster Autrey that the defendant, Sleep E-Z Mattress, Inc., owned, controlled and officered by him

and his wife, was nothing but a hollow shell and a sham and was used as a receptacle in which to dump the fraudulently conveyed assets, even while the case at bar was pending. The conduct of the Autrey family in connection with the failure of Veraco, Inc., and the disposal of its assets was such as to arouse the indignation of an able trial Judge and resulted in Judge Thurmond Clarke rendering judgment for the trustee for the value of the property so transferred, together with exemplary damages against the actors under Section 3294 of the Civil Code of California.

The defendant, Stella Autrey, was not a mere innocent bystander as is so earnestly contended by counsel for the appellants. Stella Autrey was a stockholder in the original fraudulent transferee, Autrey Brothers, Inc. At page 3 of Plaintiff's Exhibit No. 2, Lewis B. Autrey admits that all of the capital stock of Autrey Brothers, Inc., was owned and controlled by himself and his wife, Stella Autrey, prior to the filing of the complaint. He admitted that prior to the filing of the complaint he had owned 4,000 shares of Autrey Brothers, Inc., out of 5,000 shares. His wife, the defendant, Stella Autrey, owned 999 shares; the other share was owned by one, Robert Willey, who was Vice-President and an employee of Autrey Brothers, Inc. [See Tr. Ex. 2, pp. 3, 4.] After the suit was started, the witness, Lewis Buster Autrey, and Stella Autrey relieved themselves of their stock to one, E. T. Autrey. [Pltf. Ex. 2, p. 4.] They sold the stock to E. T. Autrey on November 8th, after the suit was filed. [Pltf. Ex. 2, p. 5.] Autrey testified that our lawsuit had ruined his credit. The stock then found its way from E. T. Autrey to one, Alvis Dunbar, who was a former employee who had been fired and now turned up, so far

as the defendant Lewis Autrey knew, as the sole stockholder of Autrey Brothers, Inc. [See Pltf. Ex. 2, p. 6.] The defendant, Sleep E-Z Mattress, was then incorporated in October of 1954, the month in which the action in the lower court was filed [Pltf. Ex. 2, p. 65], and remained an empty shell from the date of its incorporation until January 1, 1955, when the merchandise sought to be recovered by the trustee was transferred to it. [See deposition of Lewis B. Autrey, pp. 63-69.] Stella Autrey, former stockholder of the defendant, Autrey Brothers, Inc., was Vice-President of the corporation known as Sleep E-Z Mattress, Inc. She, like her husband, scrupulously refrained from appearing at the trial of the above entitled matter, and there is no evidence whatsoever of her disapproval of the activities of the corporation in which she was Vice-President. It is very evident from a reading of the entire deposition of Autrey that, with this suit directed against him and his wife, he proceeded to cover up or dispose of every bit of property that he owned. He borrowed \$30,000.00 on certain real property which had theretofore been owned by Autrey Brothers, Inc., and transferred the remaining equity to Sleep E-Z Mattress. His home, which was worth \$20,000.00, prior to the filing of this suit was encumbered by a \$2,500.00 mortgage. In October 1954 when the suit was started, he borrowed \$5,000.00 more against his home from a loan company. When he got through he had rendered himself as execution proof as possible. The entire scheme involved here is between members of the Autrey family and none of the defendants had the courage to appear before Judge Clarke and give their version of the weird maneuvers indulged in by them.

We quote from the District Judge before whom the case of *Hedrick v. Hockfield*, 283 Fed. 574 was tried:

“Eliminating, for the present, other phases presented by the evidence, the primary and essential question to be decided is whether, upon the undisputed facts, the plaintiff has sustained his allegation of fraud. It is an elementary principle, based upon and amply vindicated by experience, that when an insolvent debtor conveys his property to a near relative, the effect of such conveyance being to place such property beyond the reach of his creditors, and the validity of such conveyance is called into question by his creditors, the court requires that such relatives, claiming to have acquired title to such property, show by satisfactory evidence that the conveyance was based upon a valuable consideration, free from any intention on the part of the debtor, known to or participated in by the grantee, to hinder, delay, or defraud his creditors.”

We also direct the court's attention to the footnote set forth in the opinion of the Supreme Court of the United States in *Pepper v. Litton*, 308 U. S. 295, under note 28:

“On this point the District Court said: ‘“An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton and Dixie Splint Coal Company because they are in reality the same. In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the

corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors.”

We also quote from the language of Justice Douglas in the same case of *Pepper v. Litton* as follows:

“Thus, salary claims of officers, directors and stockholders in the bankruptcy of “one-man” or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors. And that result may be reached even though the salary claim has been reduced to judgment.”

In the case at bar we are dealing with a group of family corporations, brothers and husband and wife. All of their efforts were directed toward a scheme to hinder, delay or defraud creditors scheduled in the sum total of \$132,271.01. [Tr. p. 138.] The bankrupt, at its own figure, had only \$59,565.40 worth of assets to meet this large indebtedness. Of these assets, \$46,235.40 constituted accounts receivable. [Tr. p. 140.]

The merchandise transferred having been placed beyond the reach of the trustee by the secret and speedy actions of the members of the Autrey family, the trustee would then be entitled to recover judgment against the joint tortfeasors for the value of the merchandise so withdrawn from the trustee's reach. (See *Brainard v. Cohn*, 8 F. 2d 13.)

The Nature and Validity of the Times-Mirror Co. Claim.

Was the Times-Mirror Co., a creditor who could have avoided the transfer of these retail outlets either by reason of violation of the Bulk Sales Laws of the various States or by reason of the fact that the transfers were made with intent to hinder, delay or defraud creditors in violation of Section 67 of the National Bankruptcy Act? The Times-Mirror Company was a creditor of the bankrupt corporation in the sum of \$2,465.87 at the date of bankruptcy. The Times-Mirror Company publishes two newspapers, the Los Angeles Times and the Los Angeles Mirror, and the advertising accounts of both papers were kept separately. The Times-Mirror Company, a creditor, is a corporation organized under the laws of the State of California. [Tr. p. 85.] The ledger sheets of the creditor, on open account, are in evidence as Plaintiff's Exhibits 1A and 1B. They would appear, in connection with the testimony of William Bradshaw, Assistant Credit Manager of the creditor, to be somewhat confused as a result of belated posting. His testimony commencing at page 83 is more or less confused until he reaches page 93 of the Record. At that time a short recess was taken in order to give him an opportunity to reconcile the figures of the two ledger sheets, and after the recess he was asked the following question beginning at page 93:

"Q. I believe the pending question was whether or not on November 9th, 1953, or at any time thereafter, the bankrupt, Veraco Inc., owed the Times-Mirror Company nothing on open account. A. Do you want me to—just yes or no?

Q. Yes. A. At no time.

Q. (By Mr. Tobin): In regard to the Times, I believe you testified on direct examination that there was one time, in January, I believe, of 1954, that the Times account had balanced out? A. Yes.

Q. Can you tell us whether or not there had been a debit item against the bankrupt prior to January 18th which had not yet been posted?

Mr. Ross: Just a moment. I object to the question on the ground that the documents are in evidence and they speak for themselves.

Mr. Tobin: According to the records—

Mr. Ross: It is not the best evidence when the documents are before the court.

The Court: I will overrule the objection. I will let him answer.

The Witness: Answer the question?

The Court: Yes.

The Witness: On January 18th, where the last payment previously mentioned brought it into balance, the next posting was an item of January 17, 1954, for an advertisement in the amount of \$369.60.

Q. (By Mr. Tobin): That is \$369.60? A. \$369.60. That particular January 17th posting, which, according to the books, should have been posted prior to the January 18th occasion, would have left that amount of balance owing at that particular time.

Q. And unpaid? A. As an unpaid item."

It now appears to be perfectly clear that the previous answers given by the witness were in error, inasmuch as an item of January 17th had not been posted to the ledger account until after January 18th, the date when the account appeared to have been brought into balance.

Section 3430 of the Civil Code of California defines “creditor” as follows:

“A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money.”

Section 67c of the Bankruptcy Act defines a “creditor” as being a person in whose favor a debt exists.

Section 67d, subdivision (2), of the Bankruptcy Act reads as follows:

“Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this act by or against him is fraudulent, (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law to hinder, delay or defraud either existing or future creditors.”

It is obvious that the Times-Mirror Company was an existing creditor at the time of the transfers complained of in the sum of \$369.60. [R. p. 95.] At the date of bankruptcy it was an unpaid creditor in the sum of \$2,465.87 according to the plaintiff's complaint. [Tr. p. 6.] It was stipulated that the Times-Mirror Company had filed its Proof of Debt in the bankruptcy proceeding of Veraco, Inc. [Tr. p. 88] and an unpaid balance due on the Mirror account in the amount of \$1,646.54 was charged off according to the testimony of the witness, Bradshaw, on August 27, 1954.

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MILTON GRADY RAMSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
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FILED

AUG 29 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

MORRIS LAVINE,
619-620 A. G. Bartlett Bldg.,
215 West Seventh Street,
Los Angeles 14, California.

Attorneys for Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;

LOUIS L. ABBOTT,
Asst. U. S. Attorney, Chief, Criminal
Division;

JOSEPH F. BENDER,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

In the United States District Court in and for the
Southern District of California, Central Division

September, 1955, Grand Jury

No. 24515

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON GRADY RAMSEY,

Defendant.

INDICTMENT

[U.S.C., Title 26, Secs. 5601, 5606, 5603, 5691, 5642
and 5632, Liquor Tax Evasion.]

The grand jury charges:

Count One

[U.S.C., Title 26, Sec. 5601]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did have in his possession and custody and under his control a still and distilling apparatus, namely: a 100-gallon copper pot type still, which was not registered as required by United States Code, Title 26, Section 5174(a). [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Count Two

[U.S.C., Title 26, Sec. 5606]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did carry on the business of a distiller without having given bond as required by United States Code, Title 26, Section 5176(a), and did engage in, and carry on, the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him. [3]

Count Three

[U.S.C., Title 26, Sec. 5603]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did engage in, and intend to be engaged in, the business of a distiller and rectifier and did fail and refuse to give the notice thereof required by United States Code, Title 26, Sections 5175(a) and 5271(a). [4]

Count Four

[U.S.C., Title 26, Sec. 5691]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did carry on the business of a rectifier and did wilfully fail to pay the special tax required by United States Code, Title 26, Section 5081. [5]

Count Five

[U.S.C., Title 26, Sec. 5642]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did possess distilled spirits, namely: approximately 40 gallons of distilled spirits, the immediate containers of which did not have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, in violation of United States Code, Title 26, Section 5008(b)(1)[6].

Count Six

[U.S.C., Title 26, Sec. 5632]

On or about September 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Milton Grady Ramsey did remove approximately 40 gallons of distilled spirits, on which the tax required by law was not determined and paid, to a place other than the internal revenue bonded warehouse provided by law and did conceal said removed spirits.

A True Bill,

/s/ ORVILLE J. HARRELL,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed October 19, 1955. [7]

[Title of District Court and Cause.]

MINUTES OF THE COURT

OCTOBER 31, 1955

Present: The Hon. Harry C. Westover, District Judge.

Ass't. U. S. Att'y.: Volney V. Brown, Jr.

Counsel for Defendant: Morris Lavine.

Defendant is present on bond.

Proceedings:

For arraignment and plea.

Defendant is arraigned and pleads not guilty as charged in all 6 counts of Indictment.

It Is Ordered that this cause is set for trial Dec. 20, 1955, 10 a.m.

JOHN A. CHILDRESS,
Clerk. [8]

[Title of District Court and Cause.]

MOTION TO SUPPRESS EVIDENCE
AND DISMISS CASE

Comes now Milton Grady Ramsey and moves to dismiss the indictment and suppress the evidence on the ground that it was based upon evidence illegally searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the

United States and Rule 41, Rules of Criminal Procedure for the District Courts of the United States in this, viz.:

A search warrant was obtained on September 15, 1955, to search the premises at 1011 and 1011½ 223 street, Torrance, California, for "tax unpaid distilled spirits" which are illegal to possess under 26 U.S.C.A. 5008 (b) (1). This was the only ground given for search.

The officers nevertheless seized and destroyed other articles, set forth in their return and upon which it is obvious that the indictment is based, and for which there was no search warrant.

This motion will be based upon the records and files of this case, the search warrant and return, and Commissioner's Docket No. 17, Case 477, and any testimony, and affidavits to be produced, and will be made before the Honorable Harry Westover, U. S. District Judge, in his courtroom in the Federal Building on December 20, at 10 a.m. or as soon thereafter as said motion can be heard and determined.

/s/ MORRIS LAVINE,

Attorney for Milton Grady
Ramsey. [9]

Points and Authorities

The Fourth and Fifth Amendments U. S. Constitution.

“* * * No warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

The section must be liberally construed to safeguard the right of privacy. *Byars v. U. S.* 273, U. S. 28. Its protection extends to offenders as well as the law abiding. *Weeks v. U. S.* 232, U. S. 383; *Agnello v. U. S.* 269, U. S. 20.32. U. S. v. *Lefkowitz* 285, U. S. 452.

Evidence received in violation of or beyond a search warrant is improperly received. U. S. v. *Lee* 83 F(2) 195.

The property to be seized must be identified in the search warrant. Rule 41 (c) Federal Rules of Criminal Procedure.

Secondary Evidence of evidence illegally obtained as primary evidence or by an illegal search is not admissible. *Silverthorne Lumber Co. v. U. S.* 251, U. S. 385. The destruction or return of the primary evidence would not permit testimony regarding the same. *Silverthorne Lumber Co. v. U. S.* 251, U. S. 385.

/s/ MORRIS LAVINE.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 20, 1955. [10]

[Title of District Court and Cause.]

MINUTES OF THE COURT

DECEMBER 20, 1955

Present: The Honorable Harry C. Westover, District Judge.

Asst. U. S. Attorney: Jos. F. Bender.

Counsel for Defendant: Morris Lavine.

Defendant is present on bond.

Proceedings:

For hearing motion to suppress evidence and to dismiss. For trial. Court orders a jury impaneled.

The following jurors, duly impaneled, are sworn to try this cause:

1. Glenn A. Davidson;
2. Florence A. Hanger;
3. Chas. R. Treulich;
4. Aranka Rubin;
5. Florence R. Siman;
6. Chas. H. Mattern;
7. Jacqueline L. Haslett;
8. Grover C. Starling;
9. Jos. C. Caicedo;
10. Stephen Zewatch;
11. Dorothy Kammerman;
12. S. King Lanham.

It is stipulated between counsel that if one juror becomes incapacitated, the trial may proceed with eleven jurors.

Court admonishes the jury not to discuss this cause and declares a recess to 1:30 p.m. In the absence of the jury counsel on behalf of defendant and Gov't stipulate as to search warrant serve on defendant. Counsel for defendant argues in support of motion to suppress evidence and dismiss the case. Counsel for Gov't argues in opposition. Court Orders cause as to said motion stand submitted. At 11:55 a.m. court recesses to 1:30 p.m.

At 1:35 p.m. court reconvenes herein. All parties are present, and the jury and defendant are present. Court orders trial proceed.

Counsel for defendant objects to any evidence on count one of the Indictment, and states the reasons. Gov't counsel states that it does not intend to offer any evidence on count one.

Counsel on behalf of defendant moves to have all witnesses excused from the courtroom, except when testifying. Court denies said motion.

Bruce B. Awrey and James H. Coughran, respectively, are called, sworn, and testify for Gov't. Gov't Exs. 1 and 2 are marked for ident.

Howard C. Bumpass and M. F. Warner, respectively, are called, sworn, and testify for Gov't.

Court admonishes the jury not to discuss this cause.

It Is Ordered that cause is continued to Dec. 21, 1955, 10 a.m., for further jury trial.

EDMUND L. SMITH,
Clerk. [12]

[Title of District Court and Cause.]

MINUTES OF THE COURT

DECEMBER 21, 1955

Present: Hon. Harry C. Westover, District Judge.

Counsel for Gov't: Joseph F. Bender,
Ass't. U. S. Att'y.;

Counsel for Def't: Morris Lavine.

Defendant present (on bond).

Proceedings:

For further jury trial. Jury is present. Court orders trial proceed.

M. F. Warner, Gov't witness, heretofore sworn, is recalled.

Gov't Exs. 3 to 17, incl., are admitted in evidence.

George D. Crane is called, sworn, and testifies for Gov't.

Gov't Exs. 18 and 19 are admitted in evidence.

At 11 a.m. Court admonishes the jury not to discuss this cause and declares a recess. At 11:55 a.m. court reconvenes herein, and all parties are present as before, and the jury is present. Trial proceeds.

George D. Crane resumes the stand.

Charles O. Jones is called, sworn, and testifies for Gov't.

Def't's Ex. A is admitted in evidence.

Bruce B. Awrey and M. F. Warner, respectively, Gov't witnesses, heretofore sworn, are recalled.

Gov't Exs. 1 and 2, heretofore marked for ident., are admitted in evidence.

At noon Court reminds the jury of the admonition heretofore given and declares a recess to 2 p.m. At 2 p.m. court reconvenes herein, and all parties are present as before, and the jury is present. Trial proceeds.

Elroy W. Travis and John J. Linder, respectively, are called, sworn, and testify for Gov't.

At 3 p.m. Court reminds the jury of the admonition heretofore given and excuses the jury. In the absence of the jury, Court and Gov't counsel discuss certain counts in the Indictment. Counsel for defendant makes a statement.

Counsel on behalf of defendant moves for judgment of acquittal as to each of the counts in the Indictment and states reasons. Court grants said motion as to count one of the Indictment, and orders motion as to counts 2, 3, 4, 5 and 6 taken under submission.

Counsel for defendant further moves to strike from evidence all exhibits, and states reasons. Court orders said motion denied.

At 3:05 p.m. Court declares a recess. At 3:20 p.m. court reconvenes herein, and all parties are present as before, and jury and defendant are present. Trial proceeds.

Gov't rests. Marvin W. Reeves and Edward F. Drew, respectively, are called, sworn, and testify for defendant. Defendant rests. Both sides rest.

Counsel approach the bench out of hearing of the jury, and

Counsel on behalf of defendant renews motion for judgment of acquittal as to counts 2, 3, 4, 5 and 6. Court orders said motion denied.

Gov't counsel argues to the jury.

At 4 p.m. Court admonishes the jury not to discuss this cause and excuses the jury until Dec. 22, 1955, 10 a.m.

In the absence of the jury, Court and counsel discuss proposed instructions. Counsel for defendant objects to certain of Gov't instructions. Counsel for Gov't has no objections to proposed instructions.

At 4:10 p.m. It Is Ordered that cause is continued to Dec. 22, 1955, 10 a.m., for further jury trial.

JOHN A. CHILDRESS,
Clerk. [13]

[Title of District Court and Cause.]

MINUTES OF THE COURT

DECEMBER 22, 1955

Present: Hon. Harry C. Westover, District Judge.

Ass't U. S. Att'y Jos. F. Bender.

Counsel for Defendant Morris Lavine.

Defendant present (on bond).

Proceedings:

For further jury trial. Jury is present. Court orders trial proceed.

Counsel for defendant argues to the jury. Counsel

for Gov't argues further to the jury. Court Instructs the jury on the law of this case.

At 11 a.m., L. C. Murphy, Crier, is sworn as an officer to take charge of the jury during its deliberation upon a verdict, and the jury retires to deliberate upon its verdict.

Counsel for defendant objects to certain instructions.

It is stipulated between counsel, and so ordered by the Court, that the jury may have Exhibits 3 through 17, and Exhibits A, B and C.

At 11:10 a.m. the jury is given the said exhibits and the Indictment.

At 12:30 p.m. pursuant to the Court's order, the jury is taken to lunch in charge of said officer.

At 2 p.m. the jury returns to the jury room and resumes deliberation upon its verdict.

At 3:25 p.m. the jury returns into court, and all parties being present as before, the Court inquires of the jury if they have arrived at a verdict and the foreman of the jury states they have not and inquires as to certain count in the Indictment. Court instructs the jury further.

At 3:30 p.m. the jury retires to the jury room for further deliberation.

At 3:45 p.m. the jury returns into court, and all parties being present as before, and the jury being present.

In response to the Court's inquiry, the foreman of the jury states the jury has arrived at a verdict, and the jury presents its verdict finding defendant guilty as charged in counts 2, 3, 4 and 5, and not

guilty as charged in count 6 of the Indictment. The jury is polled and each juror answers that the verdict as read is his own verdict. Said verdict is read in open court and order filed and entered, to wit: (See Verdict Following:)

Court Orders cause referred to Probation Officer for investigation and report and continued to Jan. 16, 1956, 2 p.m., for sentence on counts 2, 3, 4 and 5, defendant to remain on bond, pending sentence.

Court orders the jury discharged and excused until notified.

JOHN A. CHILDRESS,
Clerk. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Milton Grady Ramsey:

Guilty as charged in Count 2 of the Indictment;
Guilty as charged in Count 3 of the Indictment;
Guilty as charged in Count 4 of the Indictment;
Guilty as charged in Count 5 of the Indictment,
and

Not Guilty as charged in Count 6 of the Indictment.

Dated: Los Angeles, California, December 22, 1955.

/s/ GROVER C. STARLING,
Foreman of the Jury.

[Endorsed]: Filed December 22, 1955. [15]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
OR IN THE ALTERNATIVE FOR A NEW
TRIAL

Comes Now Milton Grady Ramsey and moves this Honorable Court for a Judgment of Acquittal or in the alternate for a New Trial as to Counts II, III, IV and V of the Indictment, upon the following grounds, to wit:

1. The evidence is insufficient to support the verdict that, on or about September 15, 1955, the defendant Milton Grady Ramsey did carry on the business of a distiller, as set out in Count II; and the defendant moves for a judgment of acquittal or, in the alternate, for a new trial on the ground of the insufficiency of the evidence to establish that, on or about September 15, 1955, in the County of Los Angeles, the defendant Milton Grady Ramsey did engage in and did intend to engage in the business of a distiller and rectifier and did fail and refuse to give notice thereof as required by United States Code, as set out in Count III; and the defendant moves for a judgment of acquittal or, in the alternate, for a new trial on Count IV on the grounds of the insufficiency of the evidence to establish that, on or about September 15, 1955, the defendant Milton Grady Ramsey did carry on the business of a rectifier and did wilfully fail to pay the special tax required by United States Code. The defendant Moves for a judgment of [16] acquittal or, in the alternate, a new trial on the grounds of the in-

sufficiency of the evidence on Count V to establish that, on or about September 15, 1955, the defendant Milton Grady Ramsey did possess distilled spirits, namely: approximately 40 gallons of distilled spirits, the immediate containers of which did not have affixed thereto a stamp denoting the quantity of distilled spirits contained therein as set forth in said count.

2. The defendant also moves for a judgment of acquittal or, in the alternate, a new trial on each of the following grounds:

(a) The evidence secured by illegal search and seizure in violation of the Fourth and Fifth Amendment to the Constitution of the United States was used in evidence to convict him;

(b) That the verdicts are contrary to the law and the facts;

(c) That the court erred in rulings on admissions and exclusions of evidence in the trial of the case;

(d) The court erred in rulings throughout the trial of the case;

(e) That the procedure and proceedings had in the trial of the case were erroneous.

(f) That the court erred in the instructions given and refused.

Said Motion is based upon the records and files of the case and all the proceedings, motions and rulings had in the trial thereof.

Wherefore, defendant prays that the court grant a judgment of acquittal on each of the counts named or, in the alternate, a new trial.

Dated: December 23, 1955.

/s/ MORRIS LAVINE,
Attorney for Defendant.

Points and Authorities

I.

The court erred in its construction of the meaning of business of wholesale or retail liquor dealer.

The evidence in this case showed the defendant did not make a sale; that he [17] was not operating any business or conducting any business on or about September 15th, 1955.

The government, in its Trial Memorandum, were relying on proof of at least one sale to establish the defendant was engaged in a business of a wholesale or retail liquor dealer.

The case of United States v. 673 Cases of Distilled Spirits & Wines, 74 Fed. Supp. 622, cited by the government, holds that:

“In order to sustain the allegation of libel, a single sale is sufficient * * * where there are corroborating circumstances tending to show the defendant was a wholesale liquor dealer * * * or where he had liquor on hand, or was

ready and able to procure it, in either case with the purpose of selling some or all of it to such persons as he might accept as customers.

No such circumstances existed here. There was no evidence of a single customer, or any evidence of the sale of any liquor. This applies to Counts Two, Three and Four of the Indictment.

As to Count Five, there is a fatal variance as the only proof in this case was not 40 gallons, but two gallons. There is no proof as to the contents of 40 gallons, or that it was unpaid, or distilled spirits.

II.

The evidence was illegally searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

United States vs. Boyd,
116 U. S. 616;

Silverthorne Lumber Co. v. United States,
251 U. S. 385, 64 L. Ed. 319.

III.

The court also erred in admitting evidence without any proper foundation being laid as to its free and voluntary character from the defendant, the same consisting of purported statements in the nature of confessions by the defendant to the officers.

Before such statements can be admitted, it must be shown that they are free and voluntary and a

proper foundation must be laid for their admission. [18]

Chambers v. Florida,
309 U. S. 227, 84 L. Ed. 716;

Brown v. Mississippi,
297 U. S. 278, 80 L. Ed. 682;

Spar v. United States,
156 U. S. 51, 39 L. Ed. 343;

Lisenba v. California,
314, U. S. 219, 86 L. Ed. 166.

In any case in which a confession or admissions in the nature of a confession are to be used, there should be a proper foundation laid to show that they were, in fact, free and voluntary.

In the instant case, the officers testified at great length to purported conversations which amounted to confessions, it believed. Such statements should not have been admitted until or unless it was shown that they were free and voluntary. Objections were made on that ground and overruled.

There was no proof of possession and ownership of the equipment, except through the purported conversation with the defendant. No other evidence was offered.

Respectfully submitted,

/s/ MORRIS LAVINE,

Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 27, 1955. [19]

[Title of District Court and Cause.]

MINUTES OF THE COURT

JANUARY 16, 1956

Present: Hon. Harry C. Westover, District Judge.

Ass't U. S. Att'y, Joseph F. Bender.

Counsel for Defendant, Morris Lavine.

Defendant present (on bond).

Proceedings:

For (1) hearing motion of defendant, filed Dec. 27, 1955, for judgment of acquittal, or in the alternate for a new trial.

(2) Sentencing on counts 2, 3, 4 and 5 of Indictment (verdict of guilty—judgment of acquittal as to count 1).

Attorney Lavine argues in support of motion (1) of defendant for judgment of acquittal, etc., and further renews motion to suppress.

Court Orders all motions denied.

Court Sentences defendant to two years imprisonment on each of counts 2, 3, 4 and 5 of the Indictment, to run concurrently, and pay a fine unto U. S. A. in the sum of \$500, on each of said counts, making a total of \$2,000.

It Is Adjudged that bond of defendant be continued in force and effect for 48 hours.

JOHN A. CHILDRESS,
Clerk. [21]

United States District Court for the Southern
District of California, Central Division

No. 24515-Criminal

UNITED STATES OF AMERICA,

vs.

MILTON GRADY RAMSEY.

JUDGMENT AND COMMITMENT

(Rev. 7-52)

On this 16th day of January, 1956, came the attorney for the government and the defendant appeared in person and by counsel, Morris Lavine, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of on or about Sept. 15, 1955, did carry on the business of a distiller without having given bond, did engage in, did carry on the business of a rectifier, did possess distilled spirits, in violation of Sections 5606, 5603, 5691, 5642, Title 26, U. S. Code, as more fully set forth and as charged in Counts 2, 3, 4 and 5 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of two years on each of Counts 2, 3, 4 and 5 of the Indictment, to run concurrently and pay a fine unto the United States of America in the sum of \$500.00 on each of said counts, total fine \$2,000.00.

It Is Adjudged that the bond of the defendant be continued in force and effect for forty-eight hours.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,

United States District Judge.

[Endorsed]: Filed January 16, 1956. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court;
for the Southern District of California, Central
Division

Name and Address of Appellant: Milton Grady
Ramsey, 1101 W. 223d Street, Torrance, Cali-
fornia;

Name and Adress of Appellant's Attorney: Morris
Lavine, Esquire, 215 West Seventh Street,

Suite 620, Los Angeles, California, Telephone TR 3241.

Offenses: Violation of Internal Revenue Code, Title 26, Section 5606 as required in Section 5176 (a); Section 5603 as required in Sections 5175 (a) - 5271 (a); Title 26, Section 5691, as required in Title 26, Section 5081; Title 26, Section 5642, as required by Section 5008 (b) (1). (Engaging in business of distiller; without paying tax and failing to notify government of operations; possession of unpaid tax on distilled spirits.)

Judgment: Judgment was pronounced on Counts II, III, IV and V of the indictment on January 16, 1956, as follows:

Count Two—two years in custody of attorney general and fine of \$500.00;

Count Three—two years in custody of Attorney General and fine of \$500.00; [23]

Count IV—two years in custody of Attorney General and fine of \$500.00;

Count V—two years in custody of Attorney general and fine of \$500.00.

Sentences in the custody of Attorney General to run concurrently.

The total fine to be \$2,000.00.

Name of Institution where now confined if not on bail: None.

Bail fixed at \$5,000.00.

I, Milton Grady Ramsey, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgments. I elect not to serve my sentence

pending appeal. Bail was fixed by the trial judge, on appeal, in the sum of \$5,000.00.

Dated: January 17, 1956.

/s/ MILTON GRADY RAMSEY,
Appellant.

/s/ MORRIS LAVINE,
Attorney for the Appellant.

Bail fixed on appeal by Judge Westover in sum of \$5,000.00.

[Endorsed]: Filed January 17, 1956. [24]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

You will please prepare the following record for
and on behalf of the defendant's appeal in the
above-entitled action:

1. The complete Reporter's Transcript of the trial, in the courtroom of Judge Harry Westover;
2. The Clerk's Transcript consisting of the Indictment;
3. Motion to Suppress the Evidence;
4. Opposition to the Motion to Suppress the Evidence;
5. The Clerk's Minutes on the arraignment and on the hearing on Motion to Suppress the Evidence;

6. The Minutes of the Court of each day of trial;
7. The Verdict of the Jury;
8. The Motion for Judgment of Acquittal and/or in the Alternate for a New Trial;
9. The Order Denying Motion for Judgment of Acquittal and/or New [25] Trial, and the Clerk's Minutes thereon;
10. The Judgment and Sentence;
11. The Notice of Appeal, and
12. This Praecipe.

Dated: January 23, 1956.

/s/ MORRIS LAVINE,

Attorney for Defendant and
Appellant.

Affidavit of Service by mail attached.

[Endorsed]: Filed January 26, 1956. [26]

[Title of District Court and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME
FOR FILING AND DOCKETING RECORD
ON APPEAL

State of California,

County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney of record for the appellant in the above-entitled action. That the record on appeal is now being prepared and a reporter is preparing the Reporter's Transcript on appeal, but

that affiant has been advised that it may not be possible to complete it in time.

That the time within which the record must be docketed and filed with the United States Court of Appeals for the Ninth Circuit, unless it is extended by this Honorable Court, is February 26, 1956.

Wherefore, affiant prays that this Honorable Court extend and enlarge the time for thirty (30) additional days to prepare and docket the record on appeal in the above-entitled action.

/s/ MORRIS LAVINE.

Subscribed and sworn to before me this 21st day of February, 1956.

[Seal] /s/ VERONA TAFT,

Notary Public in and for Said
County and State. [28]

ORDER

Upon application of Morris Lavine, attorney for the above-named defendant and appellant, and good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be prepared and docketed be and the same is hereby extended for a period of thirty days, to and including, March 27th, 1956.

/s/ HARRY C. WESTOVER.

Judge Presiding.

[Endorsed]: Filed February 23, 1956. [29]

In the United States District Court, Southern
District of California, Central Division

No. 24,515-Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON GRADY RAMSEY,
Defendant.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, December 20, 1955

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney, by

LEWIS LEE ABBOTT,

Assistant United States Attorney,

Chief, Criminal Division, and

JOSEPH F. BENDER,

Assistant United States Attorney.

For the Defendant:

MORRIS LAVINE, ESQ.,

619-620 A. G. Bartlett Bldg.,

217 West Seventh Street,

Los Angeles 14, California.

Tuesday, December 20, 1955—10:00 A.M.

(Other court matters.)

The Clerk: Case No. 24,515, Criminal, United States of America vs. Milton Grady Ramsey.

Mr. Lavine: Ready for the defendant, subject to a motion to suppress evidence and dismiss the case.

Mr. Bender: Ready for the Government.

Mr. Lavine: The Government estimates two days. I think that is a fair estimate. It may take a day and a half.

The Clerk: Is the defendant here, Mr. Lavine?

Mr. Lavine: Yes, right next to me.

(Other court matters.)

The Court: Well, we will proceed with the selection of the jury in your case, Mr. Lavine. If you will make your motion, I will take it under submission, and I will let you argue.

Have you your motion?

Mr. Lavine: Yes, sir. It is in writing.

The Court: May we consider the motion made in open court and I will take the matter under submission, and we will proceed with the selection of the jury.

Mr. Lavine: Thank you, your Honor. The Commissioner's file will have to be brought down in connection with the [3*] motion. May that be deemed to be offered in evidence at this time or——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: It will be deemed to be offered. It won't be deemed that it is received.

Mr. Lavine: Very well. That is in connection with the motion.

The Court: The motion is filed.

(Whereupon, the motion was filed with the clerk.)

(Whereupon, the following jurors, duly empaneled, were sworn to try the case:

1. Glenn A. Davidson,
2. Florence A. Hanger,
3. Charles R. Treulich,
4. Aranka Rubin,
5. Florence R. Simon,
6. Charles H. Mattern,
7. Jacqueline L. Haslett,
8. Grover C. Starling,
9. Joseph C. Caicedo,
10. Stephen Zewatch,
11. Dorothy Kammerman,
12. S. King Lanham.)

The Court: Ladies and gentlemen of the jury, we are going to proceed with your case, but in the meantime we have another jury to select and we also have some motions.

Mr. Lavine, how long will it take for you to argue your motions?

Mr. Lavine: 15 or 20 minutes, your Honor.

The Court: Well, we have another jury to select and then we will have these motions. By that time

I think it will be nearly noon. I think I will excuse you until 1:30. [4] Now, please be back here in this courtroom at 1:30 without any further directions. And remember now that you are not to discuss this case with anyone and you are not to allow anyone to discuss it with you and not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

Now, you may retire, but be back here promptly at 1:30. Will you leave as quietly as possible as the courtroom is still in session. And when you come back at 1:30 will you please go to the jury room on the third floor.

(Whereupon, the jury was excused until 1:30 of the same day.)

(Other court matters.)

The Court: The record may show, Mr. Lavine, that you made the motion before the empanelment of the jury and I took it under submission until I had time to consider it. Now I will consider it.

Mr. Lavine: Your Honor, I had the clerk's office search for the search warrant and the return which was filed by Commissioner Hocke with the clerk's office, and they have hunted high and low and cannot find the original. I could not find it in your file. I wonder if by any chance it is in your chambers.

The Clerk: What was that?

Mr. Lavine: The search warrant and the return of the [5] search warrant. I have Mr. Hocke here, whom I have subpoenaed. I looked through the

file and I showed the Government the search warrant that was given to my client and the return which was attached to it, and I have Mr. Hocke here for the purpose of proving it up by secondary evidence, since we cannot find the original. The clerk's office has three deputies looking for it. The court can take judicial notice that I offer it in evidence at this time on behalf of the defendant, and if your Honor desires proof by Mr. Hocke that that is the search warrant he issued——

Mr. Bender: The Government will stipulate that was the search warrant served on the defendant and issued by the Commissioner.

Mr. Lavine: I will accept the stipulation.

The Court: All right. What's wrong with the search warrant?

Mr. Lavine: There is nothing wrong with the search warrant as far as it goes, but the search was made beyond the scope of the search warrant. The search warrant only provides for a search for illegally possessed spirits, and that is the extent of the search warrant.

“Rule 41(e) of the Rules of Criminal Procedure provides that ‘a person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for [6] the return of property and suppress for use as evidence anything so obtained’ on innumerable grounds.”

I am reading now from *Cyclopedia of Federal Procedure* by Nichols, Volume 3, Section 131.13.

One of the grounds for the motion is the the property seized is not that described in the warrant.

Now, what they seized, your Honor, as shown by the return on the warrant, is not merely the alcoholic spirits, but they seized a number of other articles, all set out in their receipt, and they destroyed those articles. Now, they propose to present evidence in this case relating to the matters on which they had no search warrant, and it is my position, first, that this indictment necessarily had to be obtained on those matters on evidence that went beyond the scope of the search warrant and the right to search and seize as provided by the Fourth and Fifth Amendments. The Fifth Amendment provides

“* * * no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

Now, they seized a number of articles there, as your Honor sees by the return, that are not set out in the search warrant. The only thing that was set out in the search [7] warrant was the matter of alcoholic spirits. The rest——

The Court: Mr. Lavine, let me ask you a question: Supposing they go before the proper authorities to get a search warrant and make a representation that they have probable cause to believe that a man has in his possession in his hotel room 40 ounces of marihuana and they get a search warrant

and go into the room and find 40 ounces of marijuana and also 40 ounces of heroin.

Do you mean to say that any evidence of heroin is out, that you cannot produce it before the court because the search warrant didn't say anything about heroin?

Mr. Lavine: Yes, your Honor, I do specifically——

The Court: Where is your case. I want to know what the courts are saying, not Mr. Lavine.

Mr. Lavine: Just a minute, your Honor. I may be able to quote it.

The Court: Well, you give me the case and I will read it.

Do you have any case to the contrary?

Mr. Bender: Harris vs. United States.

Mr. Lavine: The Harris case is based upon a valid arrest and an incident to a valid arrest.

The Court: Don't tear down the Government's cases. He wants to know your cases.

Mr. Lavine: I have cited them, I think, in the memorandum. [8]

The Court: Mr. Bender, what was the citation to your case?

Mr. Bender: Harris vs. United States, 331 U. S. 145; and, in particular, page 154 and page 155.

The Court: Mr. Lavine, do you have any authorities other than what you set forth in your memorandum?

Mr. Lavine: I have authorities on the subject of search and seizure galore, but I didn't want to set all of them forth.

The Court: Well, you admit now that the warrant is good as far as 40 gallons of un-tax-paid distilled spirits is concerned?

Mr. Lavine: That's correct.

The Court: They went in and found the 40 gallons of untaxed distilled spirits. In addition to that they found a still.

Mr. Lavine: They didn't have any search warrant for a still.

The Court: But they were legally inside.

Mr. Lavine: Assuming they were legally inside, the seizure thereafter didn't make it legal. The case on that is *Takahashi vs. the United States* in 143 Fed. 2d—I can't give you the page.

The Court: The issue here is very simple. [9]

Mr. Lavine: *Boyd vs. United States*.

The Court: They had a right to go in and get the 40 gallons of untaxed distilled spirits.

Mr. Lavine: That is correct.

The Court: Give me your case that they cannot, when they are legally inside, testify as to anything else they found on the premises. That is a simple proposition. If that's the law, I will sustain you. But I want to know.

Mr. Lavine: I have two cases on the subject that the right to search does not give the right to seize. One is *Takahashi* in 143 Fed. 2d, your Honor. I am giving it from memory. But I am pretty sure that is correct. And the other case is *Boyd vs. United States*, 116 U. S. at 616.

The Court: Do you know what the page number is in 143 Fed. 2d?

Mr. Lavine: No, your Honor.

The Court: What is the name of the case?

Mr. Lavine: T-a-k-a-h-a-s-h-i vs. United States. It is the case where the Government had a lawful right——

The Court: I will read the case. I want to read the case.

Mr. Lavine: If I may just have a minute, I have another case here which I wanted to cite to your Honor. It is in my memorandum, but I haven't found it in the Law Edition, and if I may just have a minute I will give it to your Honor. [10] Silverthorne Lumber Co., your Honor.

The Court: That's in your memorandum.

Mr. Lavine: That is in my memorandum. And the cases cited there, if your Honor please, I think sustain my position in this matter. There is a——

The Court: Don't give me the cases cited in the Silverthorne case.

Mr. Lavine: No, your Honor. But there is—in the Silverthorne case they had no vestige of authority. In the Harris case cited by the Government they had there a valid arrest and they went in at that time and they made a valid arrest; and the court there, by a closely divided United States Supreme Court—I think it was 5 to 4—came to a decision that held that having been in there legally and having made an arrest that that was an incident of an arrest. But here this search was made pursuant to a search warrant, not through an incident of an arrest.

The Court: When was the defendant arrested?

Mr. Lavine: After the search, your Honor.

The Court: In the same premises?

Mr. Lavine: That, I believe, is correct. I am not sure of that, your Honor, but I believe the evidence will show.

The Court: Supposing they went in and found 40 gallons of untaxed liquor and arrested the defendant and found the [11] rest of the stuff.

Mr. Lavine: They couldn't have gone in without a warrant. They would have been in there illegally.

The Court: I will read your cases.

Mr. Bender, do you have any other cases?

Mr. Bender: I would like to speak very briefly, if I may.

Mr. Lavine: I would like to call your Honor's attention to the rules as set forth in this Federal Procedure form and the discussion there.

The Court: I will read what the courts have to say, Mr. Lavine.

Mr. Bender: Your Honor, the Government went to the premises pursuant to a lawful search warrant and found the 40 gallons of unpaid tax distilled spirits. The finding of the 40 gallons was pursuant to a lawful search warrant. The Harris case clearly holds——

The Court: Don't tell me what it holds. I will read the court case. If you have any other authorities I would like to have them.

Mr. Bender: I would like to read about half a page from the——

The Court: I would rather read it.

Mr. Bender: May I point out the portion that the Government considers to be good discussion? [12]

The Court: I will read it all. I won't read part of it.

The court will take the matter under submission. I will rule when the Government attempts to introduce the testimony. In the meantime, I will read these cases.

The Court will stand in recess until 1:30 o'clock this afternoon.

(Whereupon, a recess was taken until 1:30 o'clock of the same day.) [13]

Tuesday, December 20, 1955—1:30 P.M.

The Court: Is it stipulated that the jury is present and in the box?

Mr. Bender: So stipulated. And the defendant is present.

Mr. Lavine: So stipulated.

The Court: Do you want to make an opening statement?

Mr. Bender: No, your Honor.

Mr. Lavine: We will reserve our opening statement.

Your Honor, before the first witness is called, I want to object to any evidence on Count One of the indictment since it fails to state an offense in the language of the statute of the United States. If

your Honor will get the statute, Section 5174(a), I believe the word "set-up" is omitted.

The Court: What is missing?

Mr. Lavine: The word "set-up." In other words, the mere possession is not sufficient. It has to be set up according to the language of the statute.

Mr. Bender: If your Honor please, and if counsel please, I believe that we can shorten this by the Government stating, and as I do state, that we do not intend to offer any evidence on Count One in the indictment.

Mr. Lavine: Well, we agree at the start of the case, [14] anyhow, your Honor. And that shortens the matter.

Mr. Bender: I think counsel is absolutely correct, the requirement being that it is set up, and it comes to my attention, by investigation and reading of the file, that it was not set up at the time.

Mr. Lavine: The other motion I have to make is that the witnesses be excluded.

The Court: I don't usually make that ruling, Mr. Lavine, unless there is some very good reason.

Mr. Lavine: There will be a conflict in facts, your Honor, once these various officers——

The Court: The motion to exclude is denied.

Call your first witness.

Mr. Bender: The Government calls Bruce B. Awrey, as its first witness.

BRUCE B. AWREY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Bruce B. Awrey, A-w-r-e-y.

Mr. Lavine: Your Honor, in order to avoid repeating the objection which was made, may it be deemed that I have a continuing objection?

The Court: You may have a running objection based upon your objection this morning. [15]

And, by the way, have you got your instructions?

Mr. Lavine: No. I will have them. I am having stenographic troubles. I will try to have them the first thing in the morning before court convenes.

The Court: Ordinarily I discuss instructions with counsel, and the statute provides that I shall notify counsel what instructions I am going to give. If you don't have instructions——

Mr. Lavine: I thought the Government had covered most of the things I wanted to cover, pending, however, what evidence comes out here, and I will have instructions based on the evidence, your Honor.

Direct Examination

By Mr. Bender:

Q. Mr. Awrey, what is your profession or occupation?

A. I am a criminal investigator with the Alcohol and Tobacco Tax Branch of the Internal Revenue Department.

Q. For how long have you been so employed?

(Testimony of Bruce B. Awrey.)

A. 27 years.

Q. During that 27 years, did you have occasion to investigate stills? A. I have.

Q. Are you familiar, in general, with the operation of a still? A. I am. [16]

Q. Would you describe the working parts of a still?

A. The working parts of an ordinary still is, first of all, a burner; and that is placed under what we call the pot or the still proper where the mash is put in. From that there is a gooseneck or pipe that runs to a condenser, or it is a cooling system, a barrel with, usually, a metal barrel or any kind of a barrel with a coil in it which cools it from a vapor to a solid.

Q. What are the normal ingredients that are used in a still in the making of distilled spirits?

A. Well, there is quite a variety, but the basis for whiskey is usually corn sugar.

Q. I believe malt and yeast, also?

A. Yes. And then they add barley, wheat—any grain. But the base is usually corn sugar.

Q. Directing your attention to on or about September 15, 1955, what, if anything, did you observe on that date with reference to this case?

A. On September 15, 1955, with Investigators Jones and Warner, I went to 223rd Street, Hawthorne, and there we met Investigators Travis and Coughran.

Q. What did you do?

A. At that time Investigator Jones handed me

(Testimony of Bruce B. Awrey.)

a search warrant. The search warrant was for the premises located at 1011, which is a large house, and 1011½, which is a small [17] house, West 223rd Street.

Q. Mr. Awrey, could that have been in Torrance rather than in Hawthorne, the address? Or are you certain whether that was in Hawthorne?

A. Well, I thought it was in Hawthorne. It may not be.

Mr. Lavine: I object to the witness being led.

The Witness: But that was the address, anyway. These two houses are within the same enclosure. There is a driveway that runs up to—an entrance driveway to 1011 and also to 1011½.

This search warrant was directed to search for un-tax-paid distilled spirits. At this time, why, Investigator Warner and I drove in one car, entering the driveway at 1011.

Q. Was that on the east side of the——

A. That is the large house. Investigators Travis and Jones and Caughran, with another car, entered the driveway entering into 1011½. We drove in the same time. As I got out of the car I noticed a Plymouth car in the driveway. When we first went in we didn't notice anybody. But Investigator Warner noticed a man in the——

The Court: You can't testify as to what somebody else noticed. Only testify as to what you noticed.

Q. (By Mr. Bender): What did you see and do?

(Testimony of Bruce B. Awrey.)

A. As we approached the house Warner went back, and I went back with him, towards the front fence and the fence [18] dividing—small fence or hedge dividing the places.

Q. In other words, a direction away from the house?

A. He went back, and he met the defendant, Ramsey, and as I approached them, why, I heard him ask Ramsey if he was not Mr. Ramsey, and he said he was. At that time we showed our credentials as investigators to Mr. Ramsey. I handed him a copy of the search warrant and explained to him that this search warrant covered both premises and the outbuildings, and that we were looking—the search warrant covered un-tax-paid distilled spirits.

We then entered the large house at 1011. I didn't stay there very long because there was no odor whatsoever of distilled spirits, or manufacturing of distilled spirits.

Q. Do you use an odor test as a mean of ascertaining if there is any distilled spirits?

A. Yes, sir. Shortly after—I did really search that house around there, made a quick search.

Q. What is this odor based upon that you say you use in searching?

A. Based upon distillation and odor of whiskey after it is manufactured, or any kind of liquor.

Q. What did you do then?

A. I proceeded across to the little house, and

(Testimony of Bruce B. Awrey.)

with Investigator Jones I made a quick survey of that. There was no odor in there, or any sign of liquor distillation or [19] anything, so I didn't waste very much time in there.

And as I came out of the back of this little house there was a row of sheds there, a shed, a garage and a third shed—second shed, rather. And there I met Investigator Warner. From the first shed there was a strong odor of fermentation. From the second out-house, or a small garage, it was much stronger. I could not only smell the odor of distillation, but of liquor, too.

We proceeded down to the second shed, or the third small building in back of this small house, and there was also an odor of fermentation emanating from that building.

We returned back to the first shed, or the first building in back of the little house, and there we waited until Investigator Travis got Mr. Ramsey. And then he unlocked the first——

Q. By "he," who do you mean?

A. Mr. Ramsey. He unlocked the first shed.

Q. What did you do then?

A. Therein I noticed a hot water tank, a mash barrel; and by stepping in the door a little I could see no bottles of distilled spirits.

We opened the garage or the second shed.

Q. In what manner was it unlocked?

A. Mr. Ramsey unlocked it. Therein I could see two 5-gallon bottles and cases with gallon bottles of a brownish [20] liquor that looked like whiskey.

(Testimony of Bruce B. Awrey.)

These bottles also had no strip stamps, no indication that tax had been paid.

I opened one of the gallon bottles, tasted it and smelled it, and knew it to be whiskey.

Mr. Lavine: I object to that. There has been no proper foundation. It is irrelevant, incompetent and immaterial.

The Court: It may go out. That is, it may go out about what he knew. He opened and tasted it. That may remain in.

Q. (By Mr. Bender): Mr. Awrey, would you describe a strip stamp. What is it?

A. A strip stamp is a small stamp about half an inch wide that covers over the bottle cap. That is glued on and usually covered with another seal.

Q. In other words, it is glued in such a manner then that the bottle can or cannot be opened without breaking the strip stamp? A. That is right.

Q. Which way can it be done?

A. It can be opened by cutting it open.

Q. All right. Would you continue with your testimony then as to what you did after you found these bottles?

A. At that time I placed the defendant under arrest.

We continued the search. And in the third building, or the second shed, I found a still condensor.

Mr. Lavine: I object to that as a conclusion of the [21] witness.

Mr. Bender: This witness testified to 27 years

(Testimony of Bruce B. Awrey.)

of experience with stills and being an officer of the law.

The Court: Can't he describe what he found?

Mr. Bender: Yes, your Honor.

Q. (By Mr. Bender): Would you describe what you found?

Mr. Lavine: I move that the last answer be stricken, your Honor.

The Court: The last answer may go out.

Q. (By Mr. Bender): What did you find? Describe its general appearance, its shape and its size.

A. This was probably a 25-gallon metal barrel, you could call it, with an open top. It had a coil in it at the top to fasten on the gooseneck that goes to the still, and the other for a drain. This is a cooling system for a still.

Mr. Lavine: I move the last answer be stricken, the last part of that answer, as a conclusion of the witness.

The Court: It may go out.

Q. (By Mr. Bender): Have you actually described the physical appearance of what you found at that time?

A. Except the coil is in the barrel.

Q. Yes. What did you proceed to do after finding this?

A. Then I found the heater, or the platform, heating [22] platform for the stove. Also, I found four mash barrels that had not very recently been used; and several other barrels. Some of them had oat chips in.

(Testimony of Bruce B. Awrey.)

Q. What?

A. Oat chips. Charcoal in some of the barrels. We didn't—

The Court: I understand that these barrels didn't show any evidence of recent use.

The Witness: Those four barrels, that's right. And there was a lot of other storage there of old barrels and boxes that had nothing to do with the still.

Then I continued to search by myself. I wanted to find the complete still if it was on the premises. I found a box—

Mr. Lavine: Just a minute. I object to that as being incompetent, irrelevant and immaterial. This relates to Count One, your Honor, which the Government said they are not proceeding on.

Mr. Bender: Your Honor, it relates to the other counts of the indictment.

The Court: Overruled.

The Witness: I found a large box next to the garage and about 20 feet in front of the third building I described. In this box I found a hundred-gallon pot, or what they call the pot part of a still.

Mr. Lavine: I move to strike that "what they call the [23] pot part of a still."

The Court: It may go out. He found a hundred-gallon pot.

Q. (By Mr. Bender): Did you find anything else, Mr. Awrey?

A. At that time, or shortly after, I asked Mr.

(Testimony of Bruce B. Awrey.)

Ramsey how large this still was and he told me this pot—he told me 100 gallons.

Mr. Lavine: Just a minute. I object to that as incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: This is conversation.

Mr. Lavine: Yes, your Honor.

The Court: He said, "How big is the still," and then Mr. Ramsey answered him. Isn't it admissible?

Mr. Lavine: He had the defendant under arrest. He was then in custody. There is no showing it was a voluntary statement.

The Court: Overruled. The answer may stand.

Q. (By Mr. Bender): What did he reply to you, sir, after you asked him the question?

A. At that time I asked him where the goose-neck was, or the connecting pipe, and he said it should be in the box with the still.

I said, "It's not there." [24]

He says, "I don't know where it is." Later, I found this in the garage, which I have already mentioned, where we found the distilled spirits back of an aging barrel.

Q. I don't know whether you answered as to what the defendant stated to you after you asked him how large the still was?

A. He told me it was 100 gallons capacity.

The Court: May I get something straight? I understand that you went into these three buildings and you found various materials that you have

(Testimony of Bruce B. Awrey.)

described. Now, I assume from what you said it is your opinion that these materials could be used as a still. Is that correct?

The Witness: That is what I am coming up to, sir. That is right.

The Court: But you have described three buildings.

The Witness: That's right.

The Court: Part was found in one building and part was found in the other building. Now, if this could be used for a still—it actually wasn't set up as a still, was it?

The Witness: That's right.

The Court: And hadn't been assembled as a still?

The Witness: I assembled it before I finished.

The Court: Not what you did. But when you saw it, it hadn't been assembled as a still?

The Witness: You are right. [25]

The Court: And you talk about four barrels, mash barrels that didn't show any evidence of recent use. As far as you know, you don't know, if that was a still, you don't know when it was used, do you?

The Witness: I do. Further investigation and further conversation with Mr. Ramsey, that was established, sir.

The Court: You go ahead.

Q. (By Mr. Bender): Would you continue, Mr. Awrey? What did you do then?

A. Then I found the gooseneck which completed

(Testimony of Bruce B. Awrey.)

the still setup, and assembled it, without putting it together at that time. I told Mr. Ramsey, "I have a complete still here."

He says, "I see it."

That is all the conversation.

Q. Did Mr. Ramsey say anything in reply to your statement?

A. He said, "I see it." That is all he said.

In looking for this gooseneck I found, in the first building we unlocked, eight mash barrels that were in very good condition and had been used in the last month or so. I also found a mash hose which went from the back door of this little building under the small house. It established, as far as I was concerned, where the still had been set up.

In this room I also found 5½ sacks of corn sugar and various other—oh, hydrometers; and there was a home [26] manufactured air purifier in this same room, which would take the poisonous gasses that come from the fermentation and take care of them.

Mr. Lavine: I move to strike that as a conclusion of the witness.

The Court: It may go out.

The Witness: Some malt syrup.

Mr. Bender: This witness has had 27 years of experience in this particular phase and certainly under Wigmore——

The Court: I am not restricting him. He is testifying to what he found.

Mr. Bender: Also, as an expert, what the materials were, what they constitute.

(Testimony of Bruce B. Awrey.)

The Court: Well, I don't know. It's possible that he could be qualified. I have seen lawyers with 25 years of experience that I don't consider very good lawyers. And I have seen doctors with that amount of experience that I don't consider to be good doctors. If you qualify the witness I will let him testify. But no qualification has been made.

Q. (By Mr. Bender): Mr. Awrey, during your 27 years of experience how many stills have you had occasion to investigate, if you can estimate?

A. I would like that question clarified a little because I have had many stills gone through my hands, many more than I actually seized. But if you take the number of stills of [27] various kinds that have just gone through my hands that I have examined parts of them—I seized the larger part of them—it would be more than 800.

The Court: Have you watched a still in operation?

The Witness: Many, sir.

The Court: Have you assembled a still?

The Witness: Many of them.

The Court: Have you operated a still?

The Witness: Yes, sir.

The Court: Do you know the pieces that are required to make a still?

The Witness: An ordinary bootleg still, yes. But in a large legal distillery there are parts that are a little bit beyond me, sir.

The Court: Well, you are interested in the smaller stills, aren't you, more or less?

(Testimony of Bruce B. Awrey.)

The Witness: Yes. I worked four and a half years where I had the still house to take care of and I got very well acquainted with those. But there are still parts that are puzzling.

The Court: You are familiar with the parts that are required to set up the still?

The Witness: Yes, sir.

The Court: And you are familiar with the operations of the still? [28]

The Witness: That's right.

The Court: All right.

Q. (By Mr. Bender): Mr. Awrey, as a matter of fact, in this very case you found the parts and assembled them into what you considered to be a still, is that right? A. Yes, dozens of them.

Q. What about this particular case, the Ramsey case? A. I assembled a complete still.

The Court: Just a minute. By the word "assembled," do you mean you laid it out on the ground or you put it together so it would work?

The Witness: I tried the parts to see if they would fit, but I didn't go to the trouble of putting them together. We have a photograph of them.

The Court: In other words, you got all the parts together and from the parts you could determine that they would make a still?

The Witness: That's right.

The Court: But you didn't try it to see if it would work?

The Witness: I didn't try the still.

The Court: You didn't fire it up?

(Testimony of Bruce B. Awrey.)

The Witness: No.

Q. (By Mr. Bender): You testified that you found an air purifier, is that correct? [29]

A. That's right.

Mr. Lavine: May I take the witness on voir dire, your Honor, now?

The Court: Yes.

Mr. Lavine: Did you ever have anything to do with air purifiers?

The Witness: Not very much. Mr. Ramsey told us that——

Mr. Lavine: I didn't ask you that. I am just asking the questions about your experience now.

The Witness. I have run across several of them—different types. They are usually homemade. The average air——

Mr. Lavine: You have answered my question.

Have you ever made any air purifiers yourself?

The Witness: No, sir, I haven't.

Mr. Lavine: Have you ever taken any into custody as an officer?

The Witness: They were usually left on the job. I have seen many of them.

Mr. Lavine: You can answer that yes or no. Have you ever taken into custody, as an officer, an air purifier?

The Witness: Have I ever taken any of them?

Mr. Lavine: Yes.

The Witness: No.

Mr. Lavine: In connection with your work on

(Testimony of Bruce B. Awrey.)

stills have you ever—you said you operated a still. When did [30] you last operate a still?

The Witness: It would be many years ago. And I think I would like to explain why we operated them.

Mr. Lavine: Just answer the question, if you don't mind.

The Witness: Probably 15 years ago at least—15 or 20.

Mr. Lavine: Have you ever operated a still of the type that you say you saw in these premises?

The Witness: No.

Mr. Lavine: When was the last time that you actually saw a still in operation?

The Witness: Oh—are you referring to the large or small stills?

Mr. Lavine: Well, I am referring to the small stills now, if you want to divide them up into types.

The Witness: It may be that long ago.

Mr. Lavine: 15 years ago?

The Witness: Yes.

Mr. Lavine: When did you last see a still put together so that it would operate?

The Witness: Oh, probably a year ago.

Mr. Lavine: I am talking about the small stills now, not the big stills.

The Witness: That's right.

Mr. Lavine: What do you call a still? What is your [31] definition of a still?

The Witness: To me a definition of a still would be a plant that would make distilled spirits fit for

(Testimony of Bruce B. Awrey.)

human consumption from a mash that was already fermented.

Mr. Lavine: And would it have to have water? Would it have to have a connection for water?

The Witness: It would have to have water.

Mr. Lavine: Would you have to have piping?

The Witness: That's right.

Mr. Lavine: I have no further voir dire questions. The rest will be cross-examination.

I submit his last experience, 15 years ago, your Honor, is certainly——

The Court: I think that goes to the weight rather than the substance.

Mr. Lavine: I will renew my objection, for the purpose of time, on the ground that no proper foundation has been laid.

Q. (By Mr. Bender): Describe any difference between the still or stills that you have operated and the one that you say you found on the premises, the Ramsey premises.

A. There are various kinds of stills, and this is an ordinary pot still, as we would call it.

Q. This was the one on the Ramsey premises?

Mr. Lavine: What? [32]

The Witness: Pot.

Q. (By Mr. Bender): What was the type, or what were the types that you operated at any time?

A. That would be a pot still, large and small, and which would be seized and kept operating for certain reasons.

Q. Well, was there any difference between the

(Testimony of Bruce B. Awrey.)

one you found at the Ramsey residence and the ones you operated?

A. Some difference, but they are a general type.

Q. Directing your attention again to this air purifier that you testified you found, in your opinion, what is the purpose for an air purifier for use in a still?

A. It is to take the poisonous air which is caused by fermentation out of the room, either take it out of the room or purify it.

Q. Directing your attention back to the general testimony you were engaged in prior to this discussion, did you find anything further, any piping or anything of that nature, on the premises?

A. I noticed some piping, but I didn't go into that—the connections—as much as the other investigators did.

Q. What did you do then at this time, if anything?

A. We get back to the time that we assembled the still. Then I made a further search and found these barrels that I described in the first shed there, and then I went into the garage, which was the second place we searched, and [33] there I noticed two aging barrels set on the side.

The Court: What is an aging barrel? You understand, but these people over here never had anything to do with stills. They are novices. What is an aging barrel?

The Witness: Whiskey has to be a certain age to be what we would call good drinking whiskey.

(Testimony of Bruce B. Awrey.)

That is hurried up by various processes. And in this case it was—the process will have to be explained by the other investigators because I——

The Court: I am just asking you from your 25 years of experience what an aging barrel is?

The Witness: An aging barrel is something that by a process they use to age it quicker than it would ordinarily.

The Court: You mean age whiskey?

The Witness: Various things they have to age, they will hurry up the aging—sometimes by electricity.

The Court: Then I suppose the answer to my question is that a barrel, an aging barrel is a barrel in which whiskey is aged. Is that it?

The Witness: That would be about it.

The Court: Don't try to tell us how, because you evidently are not an expert on how.

The Witness: No, I am not. There are too many types. I couldn't be an expert on that.

The Court: All right. [34]

The Witness: But I know an ager when I see it.

Q. (By Mr. Bender): Mr. Awrey, did you observe anything further at this time?

A. There were several cartons in that room, some empty with empty gallon bottles, and three of them each had four one-gallon bottles of un-tax-paid liquor.

Mr. Lavine: I move to strike the part about the un-tax-paid liquor.

The Court: It may go out. We haven't had it

(Testimony of Bruce B. Awrey.)

established that it is liquor. All we have had established is that it was liquid in the bottles.

The Witness: I tasted it and knew it was whiskey.

Mr. Lavine: I move to strike that as a conclusion of the witness.

The Court: It may go out, unless counsel wants to lay the foundation. If the foundation is laid, you may be able to testify.

Mr. Bender: We have an agent, your Honor.

The Court: All right.

Q. (By Mr. Bender): Is there anything that you have failed to relate that you saw or observed that occurred there?

A. A little later on I had a conversation with Mr. Ramsey in the presence of Investigator Warner. At that time I questioned Mr. Ramsey as to what part an old man had [35] in the ownership or control of what we had found. That is, a man that we found in the small building. This fellow, I think his name was Lloyd, told me that——

Mr. Lavine: Just a minute.

Q. (By Mr. Bender): Not what Lloyd told you, but what did the defendant say in answer to your question?

Mr. Lavine: I object to that as not within the issues of this case.

The Court: Overruled.

The Witness: He stated that the old man—the defendant stated that the old man had nothing to do whatsoever with the violation that we had found,

(Testimony of Bruce B. Awrey.)

including the liquor and still pots and mash barrels; that it was his alone.

Q. (By Mr. Bender): By "his," who did he say?

The Witness: Mr. Ramsey owned it by himself. He said that the old man had nothing to do with it. Further questioning him as to the time, the length of time that he had operated this plant, Investigator Warner stated to Mr. Ramsey, "You have been operating here at least a year."

Mr. Ramsey said, "No, only a few months."

Q. (By Mr. Bender): Was there anything further that you can think of at this time?

A. I don't remember of anything right now.

Mr. Bender: You may cross-examine. [36]

Cross-Examination

By Mr. Lavine:

Q. You said that in order to operate the still that there would have to be a mash?

A. That's right.

Q. You found no mash on the premises, did you? A. Only the mash barrels.

Q. What was that?

A. Only the mash barrels.

Q. Then your answer to my question is that you did not find any mash at the premises, is that right?

A. That's right.

Q. Now, in order to operate a still you also have to have water, don't you? A. That's right.

Q. Did you find any of this apparatus connected up to any water?

(Testimony of Bruce B. Awrey.)

A. Not the still. But there was water in the first building that we opened. That is, there was a sink there.

Q. But you didn't find it connected to anything?

A. That's right.

Q. In order to operate a still you also have to have—well, what else do you have to have in order to operate a still?

A. You have to have a gas connection. [37]

Q. Did you find any gas connection?

A. There was gas there, but not connected up with the still.

Q. What else do you have besides a gas connection, water and a mash?

A. Well, in order to have a distillery that is the main thing. You have to have a still set up with a water connection with the condenser because that condenser must be filled with water in order to cool off the steam that comes up to a liquid. And that was——

Q. You didn't find any steam coming up there, did you, on the premises?

A. The still was not set up. There were materials there sufficient to make the mash, but there was no mash made.

Q. And you didn't find any of these elements going at any time when you were on the premises, did you?

A. The still was not in operation when we were there.

Q. You said you were handed a search warrant.

(Testimony of Bruce B. Awrey.)

A. That's correct.

Q. Is that right? A. That's right.

Mr. Lavine: May I have the search warrant, your Honor?

(Whereupon the document was handed to counsel.)

Mr. Lavine: May I have leave to approach the witness, [38] your Honor, and show him this document?

The Court: Yes.

Q. (By Mr. Lavine): Now, I will show you a copy of a search warrant and ask you if that is the search warrant that you were given at that time?

A. That's right.

Q. Speak up so the jury can hear you.

A. That is the search warrant.

Q. And that search warrant only specified the search for tax unpaid distilled spirits, is that correct? A. That is correct.

Q. You nevertheless went on to search the premises for other things besides what was specified in the search warrant, is that correct?

A. As soon as we found the un-tax-paid spirits Ramsey was placed under arrest. We didn't know but what there were other distilled spirits on the premises. So I continued to search for the distilled spirits, at the same time looking for the still because there was an indication there must be a still there, because I first saw the mash barrels. But the

(Testimony of Bruce B. Awrey.)

other violations were found afterwards in a continued search for distilled spirits.

Q. Now, you say you placed Mr. Ramsey under arrest? A. That's right.

Q. Just how long had you been on the premises when you [39] placed him under arrest?

A. Oh, maybe 45 minutes, half an hour to 45 minutes.

Q. What did you say to him when you placed him under arrest?

A. I placed him under arrest for the possession of tax unpaid distilled sprits.

Q. You told that to him in those words? Or did you say nothing to him and say, "You are under arrest"?

A. No, I made the statement to the fact why he was under arrest.

Q. Just where were you when you made that statement to him?

A. That was on the outside of the garage in which we found the distilled spirits—in front of it.

The Court: Did you make the arrest before you found the distilled spirits, or afterwards?

The Witness: After we found the distilled spirits, Mr. Ramsey was standing in front of this garage.

The Court: Then you made the arrest?

The Witness: Then I went out and placed him under arrest.

Q. (By Mr. Lavine): What did you say to him

(Testimony of Bruce B. Awrey.)

at the time that you made the arrest, if you said anything?

A. There wasn't very much to say, outside of a little later—— [40]

Q. No, at that time. Tell us the words that you used, if any at all.

A. I went on in. That was sufficient. He was under arrest. And other investigators were there.

Q. Was that what you said to him? "You are under arrest."

A. "For the possession of un-tax-paid distilled spirits."

Mr. Lavine: I see.

The Court: Is that what he was put under arrest for?

The Witness: That's right.

The Court: And that is what you told him at that time?

The Witness: That's right.

Q. (By Mr. Lavine): Now, had you or any of the officers left the premises at the time, or rather from the time that you arrived there until you made the arrest of Mr. Ramsey?

A. Nobody left the premises that I know of.

Q. Did you at that time taste any of this substance in this bottle prior to making the arrest?

A. I did. I smelled and tasted from the one gallon bottle.

Q. And what was the color of the bottle?

A. It was a plain bottle with a colored liquor in it.

A. Oh, let's see. We reached there at 12:20 and at least two hours—well, we will say about two hours.

Q. And you say you placed him under arrest about 45 minutes, which would be about 1:00 o'clock? A. Or a little bit before 1:00.

Q. Then you continued your search after that time until about 2:00 or 2:30? [42]

A. It took some time to destroy the barrels and the paraphernalia that had been found.

Q. I see. Now, you said that you found a coil in a barrel. Where did you find that coil?
(Testimony of Bruce B. Awrey.)

Q. Was it white or brown or red, or what was the color? [41]

The Court: The liquor or the bottle?

Mr. Lavine: The liquor, the alleged liquor.

The Witness: The liquor was a light brown.

Q. (By Mr. Lavine): And was it on the basis of your having tasted this substance that you made the arrest?

A. On the basis of the smell and the taste, that is why I placed him under arrest.

Q. I see. Now, how much of this substance did you taste? A. Did I taste?

Q. Yes. A. In my mouth?

Q. Yes. A. Oh, enough to taste.

Q. Well, would you say—

A. We'll say a half a spoonful.

Q. Now, after you placed him under arrest how long did you continue to remain on the premises?

(Testimony of Bruce B. Awrey.)

A. That was in the second shed, or the third building back of the little house.

Q. And that was not in operation, was it?

A. That's right. It was dry.

Q. And when you talked to the defendant about the sugar that was on the premises, he told you that came from a restaurant that he had, didn't he, in words and substance?

A. I had no conversation with the defendant about that sugar.

Q. Did he not tell you that he had been operating a restaurant?

A. During the conversation he did state something about running a restaurant but——

Q. And doesn't that refresh your recollection now that he told you that the sugar came from the restaurant? A. He didn't tell me that.

Q. I see. Now——

The Court: Did he tell anybody within your hearing?

The Witness: He did not, sir.

Q. (By Mr. Lavine): In your earlier testimony you also said that there had to be, in connection with a still there [43] had to be a burner placed under a pot. Is that correct?

A. There has to be some heat, a fire of some kind, yes.

Q. You at no time saw any burner placed under a pot there in operation, did you?

A. I never saw it burning.

The Court: Did you locate the burner?

(Testimony of Bruce B. Awrey.)

The Witness: The burner was located.

The Court: Talk to the jury so they can hear you.

Did you ever find a burner?

The Witness: The burner was a part of the platform that we found in the back room there.

The Court: But not in any way connected with the still?

The Witness: It was not connected.

The Court: And, as a matter of fact, this so-called still was in a crate, wasn't it?

The Witness: That's right.

The Court: And it was boxed up, wasn't it?

The Witness: You are right.

The Court: Well now, what part of the still was in the crate? All of it or just part of it?

The Witness: The still pot alone.

The Court: The still pot?

The Witness: That's right.

Q. (By Mr. Lavine): Did you determine in any way whether [44] the substance that you tasted came from the apparatus that you assembled?

The Court: You can answer that yes or no.

Mr. Lavine: That's right, he can answer it yes or no.

The Witness: Yes.

The Court: How can you determine then that the contents in the bottle came from the apparatus?

The Witness: A still of that type is capable of making a liquid very similar to what I tasted. With an aging process between it could be the same liquor.

(Testimony of Bruce B. Awrey.)

The Court: Well, you say "it could be." But you said before definitely it was. Where is your——

The Witness: It is possible that it could be, and that's as near as I can come to it, that that liquor I tasted could have been made in that particular kind of a still. There is no question in my mind, as far as that goes, with the aging in between.

The Court: Just a minute.

Mr. Lavine: I object to that. There was no question.

The Court: That last part may go out.

Q. (By Mr. Lavine): Now, what was the age of the liquor that you tasted?

The Court: Just a minute, Mr. Lavine. Can you tell the age of liquor by tasting it?

The Witness: You can't determine the age by tasting. [45] You can guess at it. And that is about all you can do on the age of liquor.

The Court: Do you want his guess?

Mr. Lavine: No, I don't want a guess.

The Witness: But I would say that is not old liquor.

Q. (By Mr. Lavine): Well, if you could tell it wasn't old liquor from tasting a half spoonful—is that your testimony?

A. I can tell the difference between moonshine liquor and legally manufactured liquor.

Q. You mean you can tell the difference between liquor that comes in a bottle and has a stamp on it and liquor that hasn't a stamp on it?

(Testimony of Bruce B. Awrey.)

A. And bootleg liquor, I can tell the difference, yes, sir.

Q. How long does liquor age in a bonded warehouse?

A. It's allowed to be sold after four years' aging, and it ages up from that time on.

Q. Eight, 12, is that right?

A. It is usually sold before it gets that old.

Q. Well, what is the difference between liquor that has a stamp on it and liquor that hasn't got a stamp on it that is four years old? Any difference?

A. One shows a tax payment and the other doesn't.

Q. You can tell that by the taste, can you? [46]

A. You can tell it is liquor by the taste rather than bootleg because the bootleg liquor has a different flavor entirely. They can't get rid of the mash smell odor, or the taste. There is a taste of mash in the liquor.

Q. Well now, isn't it a fact that the taste of the liquor comes from the source from which it comes, whether it comes from a certain type of grain? Isn't that what gives it its taste?

A. There are very few—no, not always that way. It is the way it's been distilled, and by the kind of still it has gone through.

Q. Well, is there any difference in the aging of whiskey in Kentucky than in some other states?

A. I have never been in Kentucky.

Q. You are an expert on whiskey.

The Court: Well, he testified only as to what

(Testimony of Bruce B. Awrey.)

he knows from his past experience. He can't testify what happened in Kentucky.

Mr. Lavine: He can testify about whiskey.

Q. (By Mr. Lavine): Isn't it a fact that the taste and the color of whiskey depends upon the source from which it comes and the climatic conditions under which it is aged? Isn't that a fact? Or do you know? If you don't know just say so.

A. That is a pretty broad question. [47]

The Court: May I ask a question of this witness?

Is there any difference in the taste between Old Taylor and Three Roses?

The Witness: Not very much.

The Court: Or Old Grandad? Why do you buy Old Taylor and pay more for it if there isn't a difference in taste?

The Witness: I couldn't answer that. I am not a whiskey buyer.

The Court: You are an expert on whiskey here. Of course I am not buying whiskey, but I would like to know what is the difference in taste between whiskies. There is a difference in taste between Scotch and Bourbon, is there?

The Witness: That is the process of the manufacturer.

The Court: What are they made out of? Are they made from the same thing?

The Witness: Scotch is a special whiskey that has a different sort of aging or flavoring.

The Court: Well, my understanding a little

(Testimony of Bruce B. Awrey.)

while ago was that whiskey can be made out of anything and regardless of what it is made out of it tastes about the same. Isn't that what you said?

The Witness: Not exactly, sir. You can't always tell what whiskey was made of. And I was referring to bootleg whiskey. But if it is manufactured in the ordinary bootleg manner there is a distinctive odor to that and a taste that [48] is very familiar to a man that has handled a lot of it.

The Court: Then you are able to tell the difference between bootleg liquor and liquor made in a regular distillery, is that correct?

The Witness: That is correct.

Q. (By Mr. Lavine): Don't they both have to use the same distilling process?

A. They don't use the same distilling process. That is why there is a difference in the flavor and a difference in the taste. In a large still there's—the croton oil is taken off by a process of pipes and it is an entirely different way of making it that gives it a different flavor.

Q. Well now, if the substance is run through a still two or three times is not the croton oil removed just the same in a small still as a big still?

A. The croton oil would be removed and you would probably have pure alcohol instead of whiskey because the water would go with the croton oil. If you would put it through a still three or four times you would have alcohol; you wouldn't have whiskey.

(Testimony of Bruce B. Awrey.)

Q. Well, have you ever run a distillate through a still three or four times yourself?

A. My experience is that that would be——

Q. Just answer that yes or no.

A. No, I haven't. [49]

Mr. Lavine: All right. That is all.

Redirect Examination

By Mr. Bender:

Q. Mr. Awrey, were there any strips on any of these jugs or bottles that you found on the Ramsey premises on September 15, 1955?

A. I didn't see all of them, but those that I did look at had no strip stamps.

Mr. Lavine: What was that?

Mr. Bender: He said he didn't see all of them but the jugs he did see had no strip stamps on them.

The Witness: That's right.

Mr. Bender: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Bender: The Government calls James Coughran.

JAMES H. COUGHRAN

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name for the court, please.

The Witness: James H. Coughran, C-o-u-g-h-r-a-n.

The Clerk: And your address?

The Witness: 1304 Ferndale Street, Anaheim, California. [50]

Direct Examination

By Mr. Bender:

Q. Mr. Coughran, what is your profession?

A. I am a criminal investigator for the Alcohol & Tobacco Tax Branch of the Bureau of Internal Revenue.

Q. Directing your attention to September 15, 1955, what did you observe on that date with reference to this case?

A. Well, at approximately 12:15 p.m., Investigator Travis and myself were in position on West 223rd Street in Torrance, California, and were joined by Investigators Warner, Awrey and Jones.

We proceeded directly to the premises at 1011, 1011½ West 223rd Street. I was driving one vehicle with Investigator Jones and Investigator Travis as passengers. Investigator Warner drove the other vehicle with Investigator Awrey as a passenger.

Q. Where did you go?

(Testimony of James H. Coughran.)

A. We went to the premises at 1011, 1011½ West 223rd Street.

Q. What did you do there?

A. Well, we entered—I entered the west driveway. There are two driveways on the enclosure, which is approximately one to one and a half acres enclosed by a fence. There is a large residence and a small residence. There [51] is a driveway to the east side of the residence and a driveway to the west side of the large residence. We entered the left or west driveway and parked the vehicle in the driveway as the other vehicle entered the east driveway. At that time I observed Investigator Warner and Investigator Awrey approach the defendant in the front yard. And they had some conversation with him. I saw a paper handed to him.

I remained in position while the three—that is, Investigators Warner, Awrey and the defendant—went into the large residence. And a short time after that I went into the residence through the back door. At that time the defendant and two ladies were in the house. One lady was identified by the defendant as his wife; the other as his mother. There was also a colored maid on somewhat of a service porch.

I remained with the defendant, his mother and his wife and the maid in the house while the search was carried on.

A short time after that Investigator Travis returned to the house. He came to the area where

(Testimony of James H. Coughran.)

the defendant was and requested the keys for the out buildings.

Q. Was this in the presence of the defendant?

A. Yes, sir. He was speaking directly to the defendant.

Q. In other words, the request was directed to the defendant? [52] A. Yes, sir.

Q. What did the defendant say?

A. The defendant made no comment at all or no effort to obtain the keys. Investigator Travis then explained to him that he needed the keys in order not to have to tear up his property. And at that time I told Investigator Travis, still in the presence of the accused, to go ahead and knock the locks off. At that time the defendant got up and produced the keys out of a pocket of a pair of overalls he was wearing.

I then took the defendant to the shed which is directly behind the small residence near the west fence of the enclosure, and he opened a door on a building that had been previously used as a garage, sometime or other as a garage, because it had double doors.

The Court: Who opened it?

The Witness: The defendant.

The Court: The defendant?

The Witness: Yes, sir. As he opened the door I could see in there, and I saw two five-gallon bottles of a liquid resembling whiskey, and some cases; also two 55-gallon oak kegs laying on their side

(Testimony of James H. Coughran.)

with an attachment into the drums that were strange to me at the time. There was a gas connection to this attachment.

I then began an inventory of the liquor in that shed. [53]

Mr. Lavine: I move to strike the word "liquor" the the witness' conclusion.

The Court: Substitute the word "liquid" for "liquor" and the objection is overruled.

The Witness: I found approximately 16 gallons of the liquid in one of the oak kegs. I say approximately 16 gallons because I drew off one gallon, the first gallon I drew off, into a one-gallon jug that I found empty there, and I did this by means of a siphon, a small hose that I converted into a siphon. And at the time I drew off this one gallon, which was the first gallon I drew out, Investigators Warner and Jones were with me. We placed—we marked this one gallon that we took out of the rectifying still, the oak barrels, and marked it with a diamond ring that belongs to Mr. Warner. And we took one jug——

Q. (By Mr. Bender): What part of the jug did you mark with the diamond ring?

A. The glass portion of the jug.

Q. Scratched it in the glass with the ring?

A. Yes. And we took one jug from the cases that we found on the floor and marked that also.

Q. Did each of these jugs, after you marked them, contain a liquid?

A. They contained a liquid.

(Testimony of James H. Coughran.)

Mr. Bender: May these be marked for identification? [54]

The Court: They may be marked as Government's Exhibits 1 and 2 for identification.

Mr. Bender: Thank you.

The Clerk: Shall I mark both jugs as one exhibit?

The Court: 1 and 2.

The Clerk: Government's Exhibits 1 and 2 marked for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 1 and 2 for identification.)

Mr. Bender: Would you place Government's Exhibits Nos. 1 and 2 before the witness, please?

(Whereupon the two exhibits were placed before the witness.)

Q. (By Mr. Bender): Mr. Coughran, would you inspect Government's Exhibits 1 and 2 for identification?

A. Yes, sir; these are the——

Q. You have inspected them?

A. Yes, sir.

Q. Where did you first see those jugs?

A. This one which is marked "cases" I first saw in the cardboard cases sitting in this garage that the defendant opened for us at the time of the search of the premises at 1011-1011½ West 223rd Street.

(Testimony of James H. Coughran.)

Q. At the time that you first saw it did it contain the dark brown liquid? [55]

A. The same substance that it contains now.

Q. Did it have a strip stamp on it?

A. No.

Q. Is that Government's Exhibit 1 for identification?

A. This is Government's Exhibit No. 2.

Q. When is the first time that you saw Government's Exhibit 1 for identification?

A. I saw the jug at the same place that I found this. However, at the time I saw it the jug was empty.

Q. You say you saw the jug at the same time you saw Government's Exhibit 2?

A. And the same place.

Q. Yes. What did you do?

A. This jug was empty originally.

Q. By "this" you mean Government's Exhibit 1 for identification——

A. Right, sir.

Q. ——for the record.

A. The substance in this jug I drew out of a 55 or 50-gallon oak barrel by means of a siphon and placed it in this jug.

Q. Where was this barrel that you siphoned from?

A. It was in the back of the shed at the same place I found this (indicating).

Q. Was that on the premises located at 1011 or 1011½ [56] West 223rd Street?

A. Yes, it was.

(Testimony of James H. Coughran.)

Q. Did you mark either of the Government's Exhibits for identification?

A. Mark them? No, sir. I put my initials on them. Investigator Warner marked them and I put my initials on them after he marked them. And so did Investigator Jones.

Q. At the Ramsey premises? A. Yes.

Q. What was then done with the two exhibits for identification?

A. Investigator Jones put them in the trunk of his car.

Q. Did you have any conversation with the defendant, or did you hear any conversation in the presence of the defendant on this occasion, on this date?

The Court: Well, he testified as to the keys. Other than the keys?

Q. (By Mr. Bender): I mean other than the key conversation, was there any conversation?

Excuse me. Have you answered the question?

A. No, sir, I haven't. I am sorry. You mean at the time we obtained these samples?

Q. I mean at any time either before or after you obtained the samples.

A. Well, during—shortly after we opened the garage [57] and I had gone inside, attempting to find a hose to make a siphon, Investigator Warner was discussing the substance with the defendant and the defendant volunteered the information that this was very good material and that there was no

(Testimony of James H. Coughran.)

headaches in this. And I don't remember the exact words. This is the gist of the conversation.

Q. How many gallons did you draw out of the barrel?

A. I drew out one five-gallon jug. I believe there was a total of $9\frac{1}{2}$ or 10 gallons. I had no further jugs. Investigator Warner asked the defendant if he had any more jugs and the defendant said yes, he had some more on the back porch but they were filled with water. And so he asked the defendant how much was in the barrel to start with and the defendant stated approximately 16 or 17 gallons. So we estimated the amount in the barrel as 16 gallons. And inasmuch as I couldn't draw it all off we destroyed the barrel and let the liquor run out on the ground.

Q. And what was the total number of gallons of liquid that you found on the premises that in your opinion resembled whiskey?

A. 40 gallons.

Mr. Bender: You may cross-examine.

The Court: Mr. Lavine, before you start your cross-examination maybe we had better take our afternoon recess.

Ladies and gentlemen of the jury, we are about to take [58] another recess. Again it is my duty to admonish you not to discuss this case with anyone or to allow anyone to discuss it with you; not to formulate or express any opinion on the rights of the parties until this case has been finally submitted to you.

(Testimony of James H. Coughran.)

With that admonition we will now recess until 3:00 o'clock.

(Short recess.)

The Court: Is it stipulated that the jury is present and in the box?

Mr. Bender: So stipulated, your Honor.

Mr. Lavine: So stipulated, your Honor.

Mr. Bender: Your Honor, the Government has a few more questions that I would like to ask of this witness on direct examination.

The Court: You may proceed.

Q. (By Mr. Bender): Mr. Coughran, directing your attention again to this September 15, 1955, date and the Ramsey premises, did you make an inventory of the material which you found there?

A. I did, sir.

Q. Would you describe for us what you found and what your inventory—

The Court: Isn't the inventory upon the back of the search warrant? Is there any dispute as to that? [59]

Mr. Lavine: No, your Honor.

Mr. Bender: But there were a few other items found on the premises which we considered to be material.

The Court: All right.

The Witness: As well as I remember, we found this 100-gallon pot, copper pot. We found a metal drum, approximately 25 gallons, with a three-

(Testimony of James H. Coughran.)

quarter - inch copper coil inside. We found 550 pounds of corn sugar. We found——

Q. (By Mr. Bender): Was that 550 pounds?

A. 550. That is an estimate.

Mr. Lavine: If your Honor please, this witness keeps saying “we.” I can’t tell whether he found it or somebody else found it, or whether he is giving what somebody else did as his evidence here.

The Court: The question is what you found.

As long as you have been interrupted, what is the difference between corn sugar and regular sugar, cane sugar?

The Witness: Sir, corn sugar is a product derived exclusively of corn.

The Court: Can you tell the difference by looking at it?

The Witness: Not very easily, no, sir. The difference—I couldn’t tell the difference by looking at it other than the labels on the side.

The Court: The labels? [60]

The Witness: Yes, sir.

The Court: On the side?

The Witness: Yes, sir.

Q. (By Mr. Bender): What else did you find?

A. This is the inventory I took of the property?

Q. Yes.

Mr. Lavine: I object to what inventory he took. What he found himself is, I think, relevant.

The Court: The question is, what did you find?

Mr. Bender: I think it was material that was on the premises and he compiled an inventory.

(Testimony of James H. Coughran.)

The Court: If he wants to he can read the inventory.

Q. (By Mr. Bender): Do you have an inventory with you?

A. Not with me. I have one.

Mr. Lavine: If your Honor please, I respectfully would object to his reading an inventory of what somebody else did, unless it was something that he personally did.

The Court: You told me you had no objection to the articles listed on the inventory.

Mr. Lavine: No, your Honor, I have no objection to the articles on the inventory, subject to my basic objection which your Honor has which was made before the jury was impaneled.

The Court: Let's put the question this way: What else did you find other than what is on the inventory? [61]

Mr. Bender: I think everything is on the inventory.

The Court: Then the inventory speaks for itself.

Q. (By Mr. Bender): Did you prepare an inventory? A. Yes, sir, I did.

Q. What was contained upon the inventory other than what you have stated?

The Court: Well, I think the inventory is the best evidence. He says he prepared it.

Mr. Bender: All right, your Honor. I will withdraw the question and approach it from this aspect:

Q. (By Mr. Bender): Mr. Coughran, what ma-

(Testimony of James H. Coughran.)

terials did you observe on the premises, the Ramsey premises on September 15, 1955?

A. I observed 550 pounds of corn sugar, five gallons of malt, two thermometers, one hydrometer, one hundred-gallon pot, a worm that I have previously described, a mash pump—it was a brass mash pump approximately one-half inch centrifugal pump—powered by a one-sixth horsepower electric motor.

Mr. Lavine: I object to the last part as being a conclusion of the witness, your Honor.

The Court: How do you know it was powered by——

The Witness: An electrical pump put out by General Electric. It has a brass plate on it that says the horsepower. I took it from that plate. [62]

The Court: All right.

The Witness: There was 100 feet, approximately 100 feet of heavy rubber hose.

It is difficult to recall exactly what was on the inventory, because there were so many items. There were these two aging barrels that I have previously described, oak barrels, approximately 50 gallons. There was a total of 26 oak barrels on the premises.

Q. (By Mr. Bender): And what was done with the material that you have described, other than the Government Exhibits for Identification Nos. 1 and 2?

A. It was destroyed on the premises, sir.

Q. Approximately what time was it destroyed?

A. Well, they took—it took approximately 45

(Testimony of James H. Coughran.)

minutes to an hour to destroy the items found. I will say between 2:00 and 3:00, probably.

Mr. Bender: You may cross-examine.

Cross-Examination

By Mr. Lavine:

Q. What is the difference between corn sugar and dextrose sugar?

A. Dextrose sugar, as I understand it, sir, is a trade name applied to a certain type of corn sugar.

Q. What you saw in these bags was "dextrose sugar," wasn't it, and not corn sugar, on the [63] label?

A. It says "dextrose sugar," a corn product manufactured by Corn Products.

Q. Manufactured by Corn Products, isn't that right?

A. Right, sir.

Q. It did not say "corn sugar" on the label?

A. Specifically, no, sir. However, that's what the Corn Products manufacture their sugar out of is corn.

Mr. Lavine: I move to strike the last part as a conclusion of this witness; no foundation laid.

The Court: It may go out.

Q. (By Mr. Lavine): Now, this motor that you described that was one-sixth horsepower——

A. It stated that on the plate affixed to the motor, yes, sir.

Q. Now, as a matter of fact, you didn't see any of these in operation, did you?

(Testimony of James H. Coughran.)

A. No, sir, I did not.

Q. And you did not see any of those things put together, the copper worm or the brass pump or any of that put together in operation, did you?

A. Put together in operation? In operation, no, sir. It was put together by Mr. Awrey. He assembled it.

Q. Did he take the pot out of the crate in which it was located?

A. Yes, sir, he did. [64]

Q. And it was in a wooden crate, was it not?

A. An open crate, yes, sir.

Q. And did you help him take it out of the crate? A. I did not, sir.

Q. Did you help him assemble any part of it?

A. I did not, sir.

Q. Did you ever see any of this apparatus in operation? A. In operation? No, sir.

Q. And after he assembled it you never saw it in operation, did you? A. I did not, sir.

Q. Now, you said that you took these two jugs, and one of them was filled and one of them was empty at the time that you picked them up, is that right?

A. Government's Exhibit No. 2 was full as it is now, with the exception of the sample which we drew off; and Government's Exhibit No. 1 was an empty jug and the substance in it came out of the rectifying still, yes, sir.

The Court: Just a minute. It came out of the

(Testimony of James H. Coughran.)

rectifying still or out of a barrel? I thought you testified you took it out of a barrel.

The Witness: I am sorry, sir. It is an oak barrel. However, it is set up as a rectifying still for aging process.

The Court: Now you are over our heads. You must remember we have a jury who don't know anything about that at [65] all. You testified that it was a barrel and now that it was a rectifying still. I don't know what that is. Did you get the liquid out of the barrel?

The Witness: A 50-gallon oak barrel.

The Court: That is what I thought you testified to.

Q. (By Mr. Lavine): Where was this 50-gallon oak barrel?

A. In the rear of the building that I described before that has sometime or other been used as a garage. It's directly behind the small residence on the premises.

The Court: You say it was in the rear of the building. Do you mean on the outside of the building or the rear part of the building?

The Witness: To the rear of the building, sir, a separate and distinct building.

The Court: Was it in the building?

The Witness: Separate from the small house, in the building.

The Court: In the building?

The Witness: In the back.

The Court: Then it wasn't to the rear?

(Testimony of James H. Coughran.)

The Witness: To the rear of the small residence, sir.

The Court: All right.

Q. (By Mr. Lavine): Now, it wasn't in 1011 or 1011½ - 223rd Street, was it? It wasn't in either one of those houses, was it? [66]

A. At the address, yes, sir. It was on the premises there.

Q. It was not in either of the two houses, was it? A. Living quarters, no, sir.

Q. Well, the address that you got the search warrant for—did you get the search warrant?

A. No, sir.

Q. Did you have a copy of the search warrant at the time? A. No, sir.

Q. Did you ever see the search warrant while you were on the premises, or before you went on the premises? A. No, sir.

Q. This building that you went into and took this jug out of and drew the other bottle out of, that came from a garage in the rear and not in 1011 and 1011½ - 223rd Street, isn't that right?

A. Not in the dwelling portions, no, sir.

Q. How far was this garage from the house?

A. From the small house, approximately—as near as I can estimate, approximately 20 feet.

Q. And it was locked, was it?

A. At first, yes, sir.

Q. And you or your fellow officer asked the defendant for the keys to this garage, did you? [67]

A. Yes, sir.

(Testimony of James H. Coughran.)

Q. Did you ask him for it?

A. For the keys?

Q. Yes. A. No, sir.

Q. Who did ask for it?

A. Investigator Travis.

Q. What did the defendant say?

A. He didn't answer at first.

Q. He did not answer? A. No, sir.

Q. And then you told him you would have to break it down unless he gave him the keys, didn't you?

A. No, sir, I did not. Investigator Travis.

Q. In your presence and hearing?

A. Yes, sir.

Q. And in the presence and hearing of the defendant? A. Yes, sir.

Q. And then the defendant took the keys out of his pocket, is that correct?

A. That is correct, sir.

Q. And was the defendant under arrest at that time? A. He was not, sir.

Q. Did you then take him out to this garage?

A. Yes, sir. [68]

Q. And did you place him under arrest at that time?

A. I never arrested the defendant, no, sir.

Q. Now, you and—what was the other officer's name that went to the garage?

A. I took the defendant myself to the garage.

Q. Were you armed at the time?

A. I certainly was, yes, sir.

(Testimony of James H. Coughran.)

Q. And then the defendant opened the garages after you took him there after this conversation with your fellow officer, is that correct?

A. That is correct, sir.

Q. Now, did you destroy all of the other liquor that was on the premises except these two jugs?

A. As far as I know, yes, sir.

Q. And were you the one who did the destroying?

A. I assisted in the destruction.

Q. And you saw everything destroyed as you listed on your inventory except these two jugs, is that correct?

A. No, sir, I did not see it all destroyed. It would have been impossible. There were five of us working. I couldn't see everything destroyed at one time.

Q. Did you talk to the other officers after the destruction and while you were making up your inventory to give to the defendant?

A. The inventory was made prior to the [69] destruction.

Q. Well, in your inventory you say the 38 gallons of whiskey was destroyed, didn't you?

A. That's right, sir.

Q. And there were only 40 gallons in the barrels, isn't that right?

A. Right.

Q. Did anybody else mark any of these bottles?

A. Yes, sir.

Q. Who else marked any of the bottles?

A. Investigator Linder marked two bottles on

(Testimony of James H. Coughran.)

the cap after he arrived, which was, oh, probably 2:00 o'clock, nearly 2:00 o'clock when he arrived.

Q. Did you destroy those two bottles?

A. I don't remember what happened to those two bottles. I suppose they were destroyed with the rest of them.

Q. Isn't it a fact that those two bottles were the bottles that were marked for evidence for you to bring in? A. No, sir, it is not.

Q. And isn't it a fact that these two bottles are bottles that you got somewhere else prior to this trial? A. No, sir, it is not.

Q. Is the same substance in each of these two bottles, the same type of whiskey?

A. As far as I know. The chemical analysis states they are the same. [70]

Q. Do you know anything about whether that is local whiskey or whether it came from a foreign country?

A. The first time I ever saw this whiskey was at the premises at 1011 and 1011½ West 223rd Street.

Q. Did you ever see any whiskey similar to that prior to and on the 15th of September?

A. On the 15th of September did I see whiskey similar to this?

Q. Yes.

A. Well, only this batch that we are speaking of right now.

Q. I see. And you never at any time ever saw any other whiskey of that same character?

(Testimony of James H. Coughran.)

A. Oh, many times, sir.

Q. Well, of the same quality and the same grade?

A. I couldn't say as to that, sir. I know nothing of the quality or the grade of the whiskey.

Q. You didn't taste that, did you?

A. Taste this? No, sir, I smelled it, but I didn't taste it.

Q. I see. Who was in charge of this investigation on this September 15th?

A. In charge of the investigation?

Q. Yes.

A. Or do you mean the searching of the premises? The [71] investigation has been going on for a year or more.

Q. I am talking about the search of the premises.

Mr. Lavine: I move to strike the former answer.

The Court: It may go out.

Mr. Bender: We object and move that it stay in on the grounds that counsel asked that question.

The Court: It may go out.

Mr. Lavine: Would you read my last question, please?

(Question read.)

The Witness: The search of the premises was originally under the control of Investigator Bruce Awrey. However, our group leader, Investigator Linder, arrived later. Whether he assumed control I do not know. I know that the original search began under the direction of Mr. Awrey.

(Testimony of James H. Coughran.)

Q. (By Mr. Lavine): Who directed the taking of certain of this evidence that you have before you?

A. No one directed this, sir. It's normal procedure to always obtain samples. That is the first thing that is done.

Q. Was this your own idea or some other officer's idea when you were on the premises?

A. I suppose it was all of our idea. You always do that when you make an investigation and find something like this. You find a sample.

Q. What I am trying to determine is who decided how much was to be destroyed and how much was to be preserved, [72] as evidence, on September 15th?

A. Well, I suppose it was a group decision, Investigator Warner, myself and Investigator Jones. We were all present at the time the samples were taken.

Q. Who would direct putting any initials on any caps of any bottles?

A. Mr. Linder might. He put his initials on, as far as I know, scratched something on it.

Q. Then wouldn't those bottles be taken in as the evidence?

A. I am in no position to question Mr. Linder, what he does.

Q. Well now, in your inventory you first listed that 40 gallons was destroyed and then you scratched out the "40." When did you do that?

A. At the time the inventory was taken, I suppose. I don't recall scratching it out.

(Testimony of James H. Coughran.)

Mr. Lavine: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Lavine): I will show you this inventory and ask you if that refreshes your recollection?

A. No, sir, it does not. I did not make this inventory.

Q. You did not make this inventory?

A. No, sir. [73]

Q. Is this in your handwriting?

A. No, sir, it is not.

Q. Who made this copy?

A. Investigator Warner.

Q. Did you make a similar copy?

A. Yes, sir.

Q. And is this not a carbon copy of the original that you made? A. No, sir, it is not.

Q. That's all in Mr. Warner's handwriting, is that correct? A. That is correct, sir.

Q. Well, did you tell Mr. Warner what you were taking and what was being destroyed?

A. No, sir. I recall that the original inventory—

Q. You have answered my question. You didn't do that. You didn't call off what was being destroyed and what was being kept?

A. As far as calling it off, no, sir, I did not.

Q. Now, you said that you drew off one of these bottles from this barrel?

A. That is correct, sir.

(Testimony of James H. Coughran.)

Q. Just where was this barrel in relation to where you drew it off? What part of the garage was it in?

A. Well, the garage, which was a very small one, [74] approximately 9 by 17 or 18 feet, faced the east. This barrel was in the southwest corner of the garage.

Q. Did you go back to the premises that afternoon after you left? A. I did, sir.

Q. You went back in search of two bottles, didn't you? A. Yes, sir.

Q. And you say you had these two bottles already?

A. Investigator Jones had these bottles.

Q. And you went back for two more bottles?

A. That's right, sir.

Q. Did you find those two bottles there?

A. No, sir, we did not.

Q. Those were the two bottles that were actually taken by Mr. Linder, isn't that right?

A. I couldn't say. I was told to go back because I had to pick up an automobile, and I accompanied Investigator Warner.

Q. You were told to pick up two bottles?

A. I was not told to pick up anything.

Q. That is what you went back to look for, wasn't it? A. Yes, sir.

Q. And you didn't find any bottles there?

A. No, sir.

Q. And you were told that those bottles had caps with [75] identification on them, weren't you?

(Testimony of James H. Coughran.)

A. I may have been. I don't remember anything about the caps.

Q. Well, how long did you stay when you went back there?

A. Oh, three minutes, four maybe—no longer than five.

Q. Did you go back into the garage again?

A. Went back into that one garage, yes, sir.

Q. Didn't you at that time tell the defendant that the investigators had left the two bottles there in their hurry to get away and had forgotten about it?

A. No, sir. I told the defendant nothing. I had no conversation with the defendant at that time.

Q. Did you tell anyone on the premises that?

A. I had no conversation with anyone on the premises.

Q. What time in the afternoon did you get back to the place?

A. It was late in the afternoon.

The Court: May I ask a question?

If nobody told you to look for two bottles, how did you know there were two bottles missing?

The Witness: Because I heard some discussion between the investigators in the office after we returned as to the bottles that Mr. Linder had marked. Then I remembered seeing Mr. Linder with a couple of bottles. They were set with the [76] others. I don't know if they were destroyed or what happened to those two bottles.

Q. (By Mr. Lavine): You say you went back later in the afternoon. About what time was it?

(Testimony of James H. Coughran.)

A. I don't recall accurately; probably between 6:30 and 7:00.

Q. You had already been back down to the Federal Building, hadn't you? You had come back, hadn't you?

A. No, sir, I didn't go to the Federal Building.

Q. Do you have a separate office for the Alcohol Tax Division? A. Yes, sir. On Hill Street.

Q. Did you go back to your offices on Hill Street?

A. No, sir, I did not. I went to the Forestry Service Garage to turn in a car.

Q. What time do you normally finish your work day? A. Normally at 4:30, sir.

Q. And what time did you finally get back from the Ramsey premises that night?

A. I arrived at home probably around 8:00 o'clock. But that made about 40 hours that I had been on duty.

Mr. Lavine: That is all, your Honor.

Redirect Examination

By Mr. Bender:

Q. Mr. Coughran, did you see Investigator [77] Linder take the samples?

A. Take the samples?

Q. Yes. Did you see him? A. No, sir.

Q. Was Investigator Linder there when you took Government's Exhibits Nos. 1 and 2 for identification?

(Testimony of James H. Coughran.)

A. No, sir. That was prior to the time that he came.

Q. At any time on September 15, 1955, did you have any conversation with Investigator Linder concerning the samples which you had taken?

A. Yes.

Q. When did you have this conversation?

A. It was when I returned from down at Torrance.

Q. What time?

A. It was roughly 4:00 or 4:30, I think, after he came back from the Commissioner's office.

Q. After the destruction of the material found on the Ramsey premises?

A. Yes.

Recross-Examination

By Mr. Lavine:

Q. Officer Linder was there right from the beginning of your investigation, wasn't he?

A. No, sir, he was not.

Q. He was there during your investigation? [78]

A. He arrived roughly at 2:00 o'clock. I don't recall exactly when he came.

Mr. Lavine: That is all.

The Court: You may step down.

(Witness excused.)

The Court: You may call your next witness.

Mr. Bender: The Government calls Howard C. Bumpass.

HOWARD C. BUMPASS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name in full.

The Witness: Howard C. Bumpass.

The Clerk: And your address?

The Witness: 1708 Comino De La Costa, Redondo.

Mr. Bender: Would you speak up, please?

Direct Examination

By Mr. Bender:

Q. What is your profession or occupation?

A. I am a grocer.

Q. Where are you employed as a grocer?

A. I own the grocery at 1643 West Carson in Los Angeles, which is surrounded by Torrance.

Q. For how long have you owned this grocery store?

A. Approximately two and a half years.

Q. What is the name of it? [79]

A. B & B Market.

Q. Are you acquainted with the defendant?

A. I am.

Q. For how long have you been acquainted with the defendant?

A. Oh, approximately the length of time I have been in the store.

Q. Directing your attention to the early part of 1955, did you have any conversation with the defendant concerning the Peerless Yeast Company?

(Testimony of Howard C. Bumpass.)

Mr. Lavine: I object to the question as being irrelevant and immaterial; not within the issues of this case.

The Court: I don't know whether it is or not. Overruled. You can answer that yes or no.

The Witness: I don't remember whether the Peerless Yeast Company was mentioned or not.

Q. (By Mr. Bender): Did you have any conversation with the defendant? A. Yes.

Q. When and where did this conversation occur?

A. It took place at my store. As to the date, I don't recall.

Q. Approximately what time, what part of the year, then?

A. It was the early part of the year. [80]

Q. Was anyone present in the immediate conversation besides yourself and the defendant?

A. No.

Q. Would you relate what the conversation was and what was said by each of you?

A. Mr. Ramsey had owned——

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: Overruled.

The Witness: Mr. Ramsey had owned a small restaurant——

Q. (By Mr. Bender): Speak up, please.

A. Mr. Ramsey owned a small restaurant practically a block from the store and he traded with us. And this particular day he approached me and

said—well, this is approximately a week after he sold his restaurant, and he explained to me that he had sold his restaurant but ordered some malt and yeast for his business and wanted to know if he could have it delivered to my premises and then he would pick it up there and reimburse me for what the charge was. And I agreed to——

Q. What did you say to him?

A. I said, “Yes, that would be perfectly all right.”

Q. Did you subsequently have the malt and yeast delivered to your store?

A. Yes. It was delivered to my store and he picked it [81] up.

Q. When it was delivered to your store who paid for it? A. I did.

Q. You paid full price for it at that time?

A. Full wholesale price.

Q. Were you ever reimbursed?

A. By Mr. Ramsey. And I gave him the bill of sale.

Q. When were you reimbursed?

A. I believe it was on the same day it arrived.

Mr. Lavine: I object to that as being incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: Overruled.

Q. (By Mr. Bender): When you were reimbursed did you receive any sum in excess of the amount that you had already paid?

A. None whatsoever.

Q. Did you on any other occasion accept and

(Testimony of Howard C. Bumpass.)

pay for any malt and yeast or any other substance on order by this defendant and at this defendant's request?

A. One other time approximately three months after, I would say, or just previous to the investigation in this case, or the apprehension.

Q. Did you have a conversation with the defendant concerning the second delivery? [82]

A. Not any more than the first.

Q. Did you have a conversation the same as the first?

A. About the same, just the same thing. He said he ordered some more yeast and would it be all right, and I said yes.

Q. Where did the conversation take place and who was present?

A. At the store. I was alone.

Q. Did you in fact then order more yeast and malt? A. I never ordered any, no, sir.

Q. What did you order?

A. I didn't order anything.

Q. What did you then accept on order of the defendant? A. I accepted yeast and malt.

Q. Did you pay for it in the same manner as you paid for the first one? A. Yes.

Q. And did the defendant then later reimburse you in the same manner? A. Yes.

Q. Did you ever at any time make any profit on either of these transactions?

A. None whatsoever.

(Testimony of Howard C. Bumpass.)

The Court: What was the amount of yeast and malt on the first delivery? [83]

The Witness: I believe it was in the neighborhood of about \$40; \$35 or \$40. The exact amount escapes me.

The Court: What poundage?

The Witness: That is something I don't know, either. I don't remember. I believe it was——

Mr. Lavine: I object to the witness' guessing.

The Witness: That is what it would be, a guess.

The Court: All you remember now is that it was about \$35 or \$40?

The Witness: I think so, in wholesale price.

The Court: What was the amount of the second?

The Witness: Approximately the same, I believe.

The Court: Did it come in a big burlap sack or small paper sacks, or what?

The Witness: Portions of it, I believe, was—I recall the barrels. I believe the yeast came in black round containers.

The Court: How big were they?

The Witness: Five gallons or so, I would say. They were approximately 10 inches in diameter; 10 or 15 inches.

The Court: How many barrels?

The Witness: Three barrels.

The Court: In which delivery?

The Witness: Both deliveries. I think they were both the same. I don't recall. [84]

(Testimony of Howard C. Bumpass.)

The Court: That is the yeast. How about the malt?

The Witness: On either occasion I don't believe I actually received it. I believe the manager of the store actually signed for it. I told him it was coming and he signed a receiving slip and paid for it.

The Court: You are the one that delivered it to the defendant. Didn't you deliver it to the defendant?

The Witness: He came to the store and picked it up, and took the bills and from that he reimbursed me.

The Court: I see.

Q. (By Mr. Bender): Did Mr. Ramsey tell his purpose for ordering this? A. He did not.

Q. How was the defendant informed or advised that the shipment, or each of these shipments had been received by yourself?

A. He wasn't. He said he would be back. He was in and out of the store, and he said it was coming in the morning and he would be in sometime during the day and pick it up.

Q. You didn't call him to let him know?

A. No.

Q. Did you place either of these orders with the Peerless Yeast Company? A. I did not. [85]

Mr. Bender: You may cross-examine.

Mr. Lavine: No cross-examine.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Bender: The Government calls M. F. Warner as its next witness.

M. F. WARNER

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: M. F. Warner.

The Clerk: And your address?

The Witness: 429 Duchess Drive, Whittier.

Direct Examination

By Mr. Bender:

Q. What is your profession or occupation?

A. Investigator for the Alcohol & Tobacco Tax Division of the Internal Revenue Service.

Q. Directing your attention to September 15, 1955, what did you observe on that date with reference to this case?

A. Well, on September 15, 1955, I accompanied Investigator Awrey——

Q. Would you please speak a little louder?

A. ——to the premises of 1011-1011½ West 223rd Street [86] for the purpose of serving a search warrant.

Q. Approximately what time did you arrive, if you did, at the premises on 223rd Street?

A. Approximately 12:20 or 12:30.

Q. By the way, is that located in Hawthorne?

A. Torrance.

(Testimony of M. F. Warner.)

Q. What did you do upon arrival?

A. Investigator Awrey and I drove in the east driveway, which was the driveway to the large house. As we were approaching the front of the house I saw a man in the front yard walking along the fence towards the exit of the east driveway. I approached him and asked him if he lived there and he said, "No, I'm the gardner."

Q. Who was this man that you say you had this conversation with?

A. I identified myself as a Federal officer and asked him his name, and he said Ramsey. At that time I was joined by Investigator Awrey and I told Mr. Awrey that the man was Milton G. Ramsey. Mr. Awrey handed him the search warrant and told him what we were there for and asked him to read the warrant, which he did.

We then entered the large house and commenced our search. Shortly therefater I left the large house and got Investigator Coughran. He returned to the house. And Mr. Awrey had previously left. Then I left and approached a row of sheds [87] just north of a small dwelling house.

Q. Who was with you at the time you approached the sheds? A. I was by myself.

Q. What did you do then?

A. At almost the same time I approached the first shed door I was joined by Investigator Awrey. And from this first shed there was emanating a strong odor of mash or distilled spirits—alcohol. We went to the second door and smelled the same

(Testimony of M. F. Warner.)

odor. Then we went farther north on the premises to the third shed and again smelled this odor. We returned to the first two sheds, where we met Investigator Jones and Investigator Travis. Investigator Travis left to get the defendant to unlock these two sheds.

The defendant returned with Investigator Coughran and unlocked the first shed, and I saw some 50-gallon barrels, a water heater, a pump and a motor and some sacks of sugar.

Then he unlocked the second shed and I saw two 5-gallon jugs containing a brown liquid that had the appearance of whiskey. We went in the shed—by that I mean the defendant, Investigator Awrey, Investigator Coughran, Investigator Jones and myself. Investigator Awrey took a gallon jug out of some cases that contained the same colored liquid, took off the cap, smelled it, tasted it and handed it to each of us. I smelled it and it had the appearance and smell [88] of whiskey. Then I saw two 50-gallon barrels facing each other that had three-quarter-inch pipe coming out of the end of the barrel into a coil and back into the barrel with a small gas burner on the coil.

I then informed Ramsey that—I just said, “Well, I know now why you had such good color to it.”

And he said, “Yes, there are no headaches in that stuff. That’s good stuff.”

I also asked him at that time how long he had been operating—how long this operation had been going on, and he said about two or three months.

(Testimony of M. F. Warner.)

Prior to that—that was after he was arrested. He was arrested before any of this questioning went on. The minute he was arrested and we identified the stuff as to what we thought was whiskey, he says, “This entire operation is mine alone.”

Q. By “he” who do you mean?

A. Mr. Ramsey. He says, “I know what you are going to do, and I want an inventory of everything that you seize or that you destroy or that you take with you.” And he showed us—he showed me a place in the back yard by a pile of rocks where he would like for us to destroy the apparatus, the whiskey and everything else so we wouldn’t muss us his back yard.

He and Mr. Awrey then left to check this other shed, and I remained in this building with Jones and Coughran. [89] I saw Investigator Coughran withdraw a sample of this brown liquid from one of these aging barrels.

Q. Was the defendant present at this time?

A. No, sir.

Q. Where had the defendant gone? Did you know?

A. He went with Mr. Awrey to unlock this other shed. After Coughran had withdrawn this one gallon jug sample from the barrel, he took another gallon jug from one of the cases. And I marked them with the date, my initials, where each one came from, and Coughran and Jones. And then Investigator Jones placed the samples in the trunk of his car.

(Testimony of M. F. Warner.)

Q. Are those samples in court today?

A. Yes, sir.

Q. Would you like to point them out, please, and describe what they are?

A. Government's Exhibit No. 2 is the bottle that was taken from one of the cases, because I took my ring and scratched on there "cases."

Q. Which ring do you speak of?

A. It is the ring I have on.

Government's Exhibit No. 1 contains the liquid that was withdrawn from the 50-gallon aging barrel.

Q. And did you mark that one in the same manner? A. Yes, sir.

Q. What was later done with the two exhibits for [90] identification?

A. Investigator Coughran, or Investigator Jones placed them in this empty cardboard case and placed them in the trunk of his car.

Q. Did you see them again subsequent to that time before you saw them in court?

A. Yes, sir.

Q. When? A. The following morning.

Q. What did you do, if anything, with either or both of these exhibits for identification?

A. I withdrew a sample, an 8-ounce sample from each jug for transmittal to the United States Chemist in San Francisco for analysis.

Q. And were each of these samples in fact transmitted to the United States Chemist in San Francisco? A. Yes, sir.

Q. By whom?

(Testimony of M. F. Warner.)

A. By Investigator Awrey.

Q. Do you know when they were transmitted to San Francisco? A. On September 16, 1955.

Q. Were you present at the time that they were forwarded?

A. I was present when they were packed. I didn't [91] actually see Mr. Awrey mail them.

Q. Where have Government's Exhibits Nos. 1 and 2 been since the samples were removed from each of them?

A. They have been in the safe at Room 850, 417 South Hill Street, Los Angeles.

Q. Until they were brought into court today?

A. Yes, sir.

Q. Now, go back, if you will, Mr. Warner, and pick up your testimony concerning what you saw and did after you participated in the obtaining of these samples at the Ramsey residence.

A. Shortly thereafter I went out of the building and saw Investigator Awrey and the defendant in a conversation down by this other building, and I went down there and Mr. Awrey had this copper pot that he had found and a steel drum that contained a coil. I didn't hear any of the conversation at that time.

Then I went back to the shed where we found these distilled spirits and Mr. Ramsey came up to me and asked me if he could go in the house and change his clothes, and I told him that he could.

Q. Did he then leave? A. Yes.

Q. The next time you saw him was he dressed

(Testimony of M. F. Warner.)

in different attire than he was dressed in when he asked to go in [92] and change? A. Yes, sir.

Q. What was he dressed in when you first saw him? A. As I recall, a shirt and slacks.

Q. What was he dressed in after he returned from the house? A. Suit and tie, sport shirt.

Q. Approximately how long was he in the house?

A. I don't recall because I left the premises at that time to get some film and flash bulbs to photograph the entire operation.

Q. Did you then return and photograph the entire operation? A. Yes, sir.

Mr. Lavine: Your Honor, may we approach the bench on a matter?

The Court: Yes.

(Whereupon the proceedings were had out of the presence of the jury and the defendant.)

Mr. Lavine: The Government has submitted to me a number of photographs that were taken and about which he is going to ask this witness questions, and each of the photographs has a lot of writing on the back that is improper; and aside from my basic objection that these were taken not in accordance with any search warrant but were taken in violation of [93] the Fourth and Fifth Amendments, the things that are on the back, if they are passed over, and I know jurors have a habit——

The Court: Have you copies of them?

(Testimony of M. F. Warner.)

Mr. Bender: No, sir. If I had known of this I could have had copies.

The Court: Well, you can get copies over the night recess, can't you?

Mr. Bender: I don't know if we can.

The Court: Or you can have these photographed.

Mr. Bender: The film went to Washington.

The Court: You can have these photographs photographed.

Mr. Bender: All right, your Honor. I think that is a good suggestion.

The Court: The writing on the back is inadmissible and——

Mr. Bender: Well, the writing on the back, it is Government's position, is descriptive. But we could have the clerk paste some heavy paper over the writing.

The Court: But the jury up there would be looking at it.

Mr. Bender: It isn't our purpose that they would read anything on the back.

The Court: Well, you had better have copies made of these over the night recess.

Mr. Bender: Should we conclude the Government's questioning of this witness? [94]

The Court: Except for these photographs. It is pretty near the time for taking a recess.

Mr. Bender: What time do you take your recess?

The Court: About 4:00 o'clock.

(Testimony of M. F. Warner.)

(Whereupon the following proceedings were had in the presence of the jury and the defendant.)

Q. (By Mr. Bender): Mr. Warner, upon your return to the Ramsey residence what did you do?

A. I photographed everything that we seized and was eventually destroyed.

Q. And what were the other investigators doing at the time that you were making these photographs?

A. Well, I think Investigators Coughran and Jones were completing their inventory. And I think Investigator Travis was in the house. I don't recall where Mr. Awrey was.

Q. Was Mr. Linder there? A. No, sir.

Q. When did Mr. Linder arrive?

A. He arrived at about 2:00 o'clock.

Q. When Mr. Linder arrived did you have any conversation with him concerning the samples which were obtained earlier by Jones, yourself and Coughran? A. No, sir.

Q. When the samples were obtained earlier was the defendant present? [95]

A. Not that I recall.

Q. What occurred then after your return and while you were taking these photographs? Did anything further occur?

A. Well, after I had completed the taking of the pictures of everything, we began to destroy all the

(Testimony of M. F. Warner.)

distilled spirits, barrels, the sugar, the malt, everything that we could connect with the operation.

Q. Where did you go then?

A. Then I took photographs of all the destroyed property.

Q. And after you took the photographs where did you go? What did you do?

A. After everything had been destroyed, why, I prepared an inventory from notes and from other information that the other investigators gave me.

Q. "By everything destroyed," do you mean Government's Exhibits No. 1 and No. 2 for identification?

A. Yes, sir.

Q. You mean they were destroyed?

A. No, sir; everything but those.

Q. At about what time did you leave the Ramsey premises on that date?

A. I would say at 3:30.

Q. Did you return later that day?

A. Yes. [96]

Q. About what time did you return?

A. Sometime after 6:00 o'clock.

Q. Was anyone with you when you returned?

A. Yes, sir, Investigator Coughran.

Q. What was the purpose of your returning to the premises?

A. We returned to Los Angeles from the premises at 1011-1011½ West 223rd Street and there was some conversation about missing bottles, missing samples. We returned to these premises to look for these two bottles.

(Testimony of M. F. Warner.)

Q. Which two bottles?

A. The two bottles that were supposed to be missing.

Q. Was anyone at the Ramsey premises at the time that you returned? A. Yes, sir.

Q. In the evening? A. Yes, sir.

Q. Who was there?

A. The defendant, his wife, one man that I can identify as William Warren, and I think two other unidentified people.

Q. Did you have any conversation with the defendant at that time? A. I did.

Q. What did you say and what did he say?

A. I asked him if the shed where these spirits were [97] found originally was locked, and I asked Mr. Ramsey if he would unlock the shed, and he did. We went in and looked around and failed to find any two jugs of liquid. We came out and I thanked him, and then we left.

Q. You didn't find the samples that Investigator Linder had taken? A. I didn't find anything.

Mr. Bender: Your Honor, at this time the Government would conclude its direct examination of this witness but for the photographs which we have discussed at the bench.

The Court: Well, it is 4:00 o'clock, and we have had a long afternoon. I think we will take our recess for the day.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you not to discuss this case with anyone and

not to allow anyone to discuss it with you; not to formulate or express any opinion as to the rights of the parties until this case has finally been submitted to you. That means when you get home tonight that you are not to discuss this case with your immediate family. You are not to discuss the case with anyone. Wait until the case is over with and then you can talk about it all you want to. But until this case has been finally submitted to you for your decision you are not to express any opinion and you are not to talk the matter over with anybody. [98]

With that admonition we will now recess until 10:00 o'clock tomorrow morning.

(Whereupon a recess was taken until 10:00 o'clock a.m. of the following day, Wednesday, December 21, 1955.) [99]

Wednesday, December 21, 1955—10:00 A.M.

The Clerk: Case No. 24515, United States of America vs. Milton Grady Ramsey.

Mr. Bender: Ready, your Honor.

Mr. Lavine: Ready, your Honor.

The Court: Is it stipulated that the jury is present and in the box?

Mr. Bender: So stipulated, your Honor. And the defendant is present in court.

Mr. Lavine: So stipulated.

The Court: You may proceed.

Mr. Bender: Your Honor, Mr. Warner was on

the stand yesterday afternoon at the close of the proceedings. May he resume the stand at this time?

The Court: Mr. Warner, come forward.

Mr. Lavine: Your Honor, may the record show that I am handing proposed instructions and copies to the Court—the originals to the Court.

And I am going to examine some pictures, if I may.

The Court: Do you want the reporter to get what you are saying?

Mr. Lavine: Yes, your Honor.

The Court: Well, you will have to speak up.

Mr. Lavine: I will speak out louder, your Honor. [102]

Mr. Bender: I don't know how your Honor would prefer to handle this. We have approximately 15 photographs which the Government intends to introduce in evidence.

The Court: It doesn't make any difference to me. Ask the clerk.

The Clerk: It doesn't make any difference. Do you want to offer them all or each one separately?

Mr. Bender: I believe separate exhibits would be better. Then we can refer to them by exhibit number.

The Court: It may be marked for identification only.

The Clerk: Government's Exhibit 3 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 3 for identification.)

Mr. Bender: Would you hand it to the witness?

Mr. Lavine: May we approach the bench, your Honor?

The Court: Yes.

(Whereupon, the following proceedings were had outside the hearing of the jury and the defendant:)

Mr. Lavine: May it please the Court, with respect to these photographs now we object to the use in evidence of any of these photographs at this time for the reason that the testimony, as it now appears, is that there was nothing found in the house and that the search warrant which was testified to was a search warrant for the two houses, the two given house addresses. There is nothing in the search warrant which [103] would give authority for the search of a garage which was locked and separate from the house and from which these photographs now purport to show pictures of things from that garage, which were not expressed in any search warrant. Therefore, any photographs of the same would be in violation of the Fourth and Fifth Amendments of the Constitution and Rule 41 of the Federal Rules for the District Court of the United States and all its provisions.

Now, last night I spent some time——

The Court: Just make your motion.

Mr. Lavine: That is my objection to the introduction of any evidence, your Honor.

The Court: Overruled.

Mr. Lavine: And may I add, so the record is

clear, that of course photographs would be secondary evidence of original articles, and under the authorities, *Silverthorne Lumber Co. vs. United States*, I object to secondary evidence.

The Court: Overruled.

Mr. Lavine: I want to clear up one thing I said yesterday on the record, your Honor. I believe your Honor and I think counsel assumed that I took the position that the search warrant was valid for the officers to go on the premises on the basis of the search. I believe it was valid for them to go into the house or houses in the search but not in the garage, which was separate and apart from the houses. I [104] wanted to make my position clear on that point. And I have objected on that ground.

The Court: The objection is overruled.

Mr. Lavine: May it be understood that I have a running objection to all of this testimony on the photographs?

The Court: You may have a running objection to that line.

Mr. Lavine: On the grounds specified.

The Court: Yes.

(Whereupon, the following proceedings were had in the presence and hearing of the jury and the defendant:)

M. F. WARNER

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Bender: I see that the clerk has handed Government's Exhibit No. 3 for identification to the witness.

By Mr. Bender:

Q. Mr. Warner, have you examined Government's Exhibit No. 3 for identification?

A. Yes, sir.

Q. Is this one of the photographs which you testified yesterday that you took of the Ramsey premises on September 15, 1955?

A. Yes, sir. [105]

Q. What is it a picture of?

A. It is a picture of the west side of the large house at 1011 East 223rd Street.

Mr. Bender: The Government offers this in evidence as Exhibit No. 3.

Mr. Lavine: I object to it on the grounds heretofore stated; violation of the Fourth and Fifth Amendments to the Constitution of the United States and Section 41 of the Rules of the Federal District Court of the United States.

The Court: Overruled.

The Clerk: Exhibit No. 3 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 3, was received in evidence.)

(Testimony of M. F. Warner.)

Mr. Bender: Have you examined all the photographs?

Mr. Lavine: I have examined all of them. In the interest of time I will make the same objection to each of them.

The Court: Same objection; same ruling.

Mr. Bender: Will you mark each one in order then?

The Clerk: Government's Exhibits 4 to 17, inclusive, for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 4 to 17 for identification.)

Mr. Bender: Would you please place the proposed exhibits before the witness?

(Whereupon, the documents were placed before the witness.) [106]

Q. (By Mr. Bender): Mr. Warner, would you examine Government's proposed Exhibits Nos. 4 through 17 which have been placed before you and which have been marked for identification only.

Have you examined the proposed Government's exhibits which have been placed before you?

A. Yes, sir.

Q. Do each of those proposed exhibits portray or are they reproductions of the photographs which you took of the premises of the Ramsey residence on September 15, 1955?

A. Yes, sir.

Mr. Bender: The Government offers Government's Exhibits for identification Nos. 4 through 17 into evidence.

(Testimony of M. F. Warner.)

The Court: They may be received in evidence.

Mr. Lavine: May it be understood that I have my objection.

The Court: Same objection; same ruling.

(The exhibits referred to, marked Plaintiff's Exhibits 4 through 17, were received in evidence.)

Mr. Bender: You may cross-examine.

Cross-Examination

By Mr. Lavine:

Q. Mr. Warner, you made out an inventory of the various articles that you photographed, did you not? A. Yes, sir. [107]

Q. And what time did you make out this inventory? A. At about 3:15.

Q. That was after all the investigation had been made and everything was destroyed?

A. Yes, sir.

Q. Was Mr. Linder on the premises at that time? A. Yes, sir.

Q. How long had he been there?

A. Approximately an hour and 15 minutes.

Q. When this inventory was made out somebody called out these items, did they not?

A. No. To qualify that, the distilled spirits, the sugar, the malt, the hose and the hydrometer, the thermometer, they had all been listed on separate pieces of paper by Investigator Coughran and Investigator Jones.

Q. Those you copied, did you?

(Testimony of M. F. Warner.)

A. Yes, sir, on that inventory.

Q. The rest of the things there were called out, is that correct?

A. The things that were called out was that I wanted—they had down one pump, one motor, and I wanted the serial number of the pump, the make of the motor, the serial number, if it had it, and the horsepower. I think Investigator Jones called that. I also had them call the motor numbers off of the 1955 Ford and the 1953 Plymouth. [108]

Q. Now, how about the gallons of liquid?

A. It was handed to me as 40 gallons.

Q. By whom?

A. This inventory—I think Investigator Coughran had the distilled spirit inventory.

Q. It was handed to you as 40 gallons and you put down 40 gallons, isn't that right?

A. Yes, sir.

Q. And when did you strike out "40" and put in the figures "38"?

A. At that time, because I forgot the two samples.

Q. I see. And had you initialed the two samples?

A. Did I initial the two samples?

Q. Yes. A. Yes, sir.

Q. Did you initial the two caps?

A. No, sir.

Q. Did Officer Linder initial the caps?

A. I didn't see Officer Linder take any samples.

Q. I see. When you changed the "40" to "38" on the inventory did you call it out to somebody?

(Testimony of M. F. Warner.)

A. No.

Q. Did you take the two gallons that were supposedly retained?

A. Did I take the original two samples? [109]

Q. Yes.

A. No. Investigator Coughran took the samples.

Q. You didn't. Did you see him take them?

A. Yes, sir.

Q. Where were those two samples located?

A. At the time he took them?

Q. Yes.

A. He took one gallon sample from a 50-gallon barrel and another gallon from a case.

Q. Were they different colors?

A. No, they were practically the same.

Q. Well, did you notice whether one was lighter and the other darker?

A. Not particularly, no.

Q. Where was the case that you are referring to? A. It was in the shed with the barrel.

Q. And where was the other 50-gallon jug?

A. 50-gallon jug?

Q. Or 5-gallon jug?

A. They were in the same room.

Q. In the same room? A. Yes, sir.

Q. Well, now, how many of you officers were there at the time?

A. At the time these samples were taken Investigator [110] Jones, Coughran and myself.

Q. Where was Linder?

A. Linder wasn't there.

(Testimony of M. F. Warner.)

Q. Was there another officer on this case?

A. There were two more.

Q. Where were they?

A. Investigator Awrey was at the back of the premises with the defendant and Investigator Travis was in the house.

Q. I see. Now, this inventory that I show you, is that in your handwriting? A. Yes, sir.

Q. And the signature below. I can't read the first part of it. Is that in your handwriting?

A. Yes.

Q. What is the first word there?

A. "M. F."

Q. M. F.? A. Yes, sir.

Q. Now, the change that you made, you put down "40 gallons" in the inventory as being destroyed on the premises, is that correct, first?

A. Yes, sir.

Q. And then you struck out "40" and put down "38" is that correct? A. Yes, sir. [111]

Q. Now, about how long after you put down the 40 did you change that to 38?

A. Well, I would say right after I put it down.

Q. You mean right there on the premises?

A. Oh, yes, sir.

Q. You didn't change that in the office after you got back to the office? A. No, sir.

Q. Did you pour out or assist in the pouring out of the 38 gallons?

A. As I recall I broke up a few jugs, yes, sir.

Q. Well, when you left did you observe that all

(Testimony of M. F. Warner.)

the jugs that you saw and had photographed were broken up? A. All but two.

Q. I see. Now, what time did you leave?

A. Approximately 3:30.

Q. Did the other officers leave at the same time?

A. I believe Mr. Awrey and I were the last ones to leave. I think Jones and Travis left first and then Coughran and then Linder and then Mr. Awrey and I. He and I were the last ones to leave.

Q. Who was last besides you?

A. Mr. Awrey.

Q. But you two left at the same time?

A. Yes, sir. [112]

Q. Now, none of these articles that you destroyed were found in the two houses, were they?

A. No, sir.

Q. And all of the articles that you found or destroyed were in this garage, is that correct?

A. They were in the three sheds.

Q. Or the three sheds. And those sheds were locked, were they not? A. Yes, sir.

Q. And did you tell the defendant, or did you hear someone tell the defendant that unless the sheds were unlocked that you would have to break in? A. No, sir.

Q. Now, you didn't see any of these articles in operation, did you? A. No, sir.

Q. Did you taste any of the liquid?

A. No, sir.

Q. The breaking up process consisted of smashing these bottles, did it not— A. Yes, sir.

(Testimony of M. F. Warner.)

Q. ———and emptying the contents?

A. Yes, sir.

Q. And the smashing up of the barrels, is that correct?

A. The barrels, the copper pot, the hoses, the motor, [113] the pump—all of it.

Q. Did you have a hatchet with you?

A. No, sir, I didn't.

Q. What did you use to smash up the barrels?

A. Well, as I recall, there was a sledge hammer and an ax and a pick ax.

Q. Did you have those with you?

A. No, sir.

Q. Now, you never at any time had a search warrant to go into the garage, did you?

A. The search warrant was for 1011, 1011½ West 223rd Street, Torrance.

Q. You never at any time had any specific search warrant for the garage, did you, describing the garage or its contents?

A. Not describing the garage, no, sir.

Q. And when you went out to the garage the garage doors were locked, isn't that correct?

A. Yes, sir.

Q. And each of these three buildings was locked? A. Yes, sir.

Q. And you had no search warrant for any one of these three buildings specifically describing them, is that correct? A. That's right.

Q. Do you have the other copy of the other inventory [114] that you copied this inventory from?

(Testimony of M. F. Warner.)

A. Yes, sir.

Q. Could I see it?

A. Yes, sir. Do you want to take it out?

Q. Yes. What I am referring to here is the original of the copy that you gave to the defendant.

A. Yes, sir.

Q. What I am referring to is not the original, but you testified here a little while ago that you made some copies, that you copied certain of this data from another document. Now, that is what I am asking you.

A. No, sir. All they had was some gallons of whiskey, so much this and so much of that on three or four sheets of paper, and I wanted to make an itemized inventory showing where it was taken from, what was taken, and Mr. Ramsey would sign it and I would sign it and he would get a copy of it.

Q. But you don't have the other data from which you said you made this copy, is that correct?

A. No, sir.

Q. Do any of the other officers, to your knowledge, have that data?

A. Not to my knowledge.

Q. Have you ever seen it since the time that you made the copies?

A. No, sir. [115]

Mr. Lavine: That is all, your Honor.

(Testimony of M. F. Warner.)

Redirect Examination

By Mr. Bender:

Q. Mr. Warner, was this search warrant for the entire premises?

Mr. Lavine: I object to that as calling for a legal conclusion of the witness, your Honor.

Mr. Bender: Your Honor, counsel has asked if it was for the garage. That is the same thing. It calls for a conclusion.

The Court: I have just been wondering—let me see the search warrant.

(Whereupon, the document was handed to the Court.)

Well, the search warrant says “* * * premises known as 1011 & 1011½ 223rd St., Torrance, California.”

It doesn't say “a building,” It says “the premises.”

Now, I live at 2700 Monterey Road. It is on a lot. Where do I live? Do I live on the entire lot or just in the house?

Mr. Lavine: Well, your Honor, the cases distinguish——

The Court: Where are your authorities?

Mr. Lavine: I have been researching them last night, and I want to give your Honor some of them.

The Court: The objection is overruled. You

(Testimony of M. F. Warner.)

may answer. I think when it says "premises" it means all the premises and [116] not just the house.

Mr. Bender: Do you recall the question?

The Witness: No.

Mr. Bender: Would you read the question, please?

(Question read.)

The Witness: Yes, sir.

Mr. Bender: No further questions.

Mr. Lavine: I have no questions.

Just a minute. I do have a question.

Recross-Examination

By Mr. Lavine:

Q. Do you know the difference between a house and a garage? A. Yes, sir.

Q. And when you first made this search you went into the house, did you not?

A. Yes, sir.

Q. And that was what your search was directed to, wasn't it?

A. No, sir. The search was directed to the premises.

Q. Well, you went into each of the houses first, did you not? A. I went into one house.

Q. And one of your fellow officers went into the other house? [117]

A. Yes, sir, I believe he did.

Q. You found no liquor in either of the houses, did you, or any spirits?

(Testimony of M. F. Warner.)

A. I found nothing in the large house.

Mr. Lavine: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Bender: The Government would like to request the Court to dismiss witness Bumpass who testified yesterday.

The Court: Any objection?

Mr. Lavine: No objection.

The Court: He may be excused.

Mr. Bender: Mr. Awrey is ill today and may not return.

Mr. Lavine: I have no objection.

Mr. Bender: Thank you.

The Government will call as its next witness George Crane.

GEORGE D. CRANE

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: George D. Crane, C-r-a-n-e.

Direct Examination

By Mr. Bender:

Q. Mr. Crane, what is your profession or occupation? [118]

A. I am a chemist and a chemical engineer.

(Testimony of George D. Crane.)

Q. For how long have you been a chemist?

A. Since 1923.

Q. Are you employed by the Government at the present time? A. Yes, sir.

Q. For how long have you been so employed by the Government? A. Since 1932.

Q. As a chemist?

A. Chemist and field officer.

Q. Have you had any experience with the control of brandy distilleries? A. Yes, sir.

Q. What experience have you had?

A. For several years I was the officer in charge in control of the production, construction and efficiency of all of the brandy and distilled spirits stills in the Southern California area.

Q. Have you had occasion to make prior analysis of the alcoholic content of liquids?

A. Yes, sir.

Q. Can you estimate approximately how many analyses you have made in your experience as a chemist?

A. Well, it would be thousands, I presume. I have [119] no recollection exactly.

Q. More than hundreds, anyway?

A. Definitely, yes, sir.

Q. Directing your attention to September of 1955, in that month, did you receive any samples from the Alcohol & Tobacco Tax Department of Los Angeles, California? A. Yes, sir.

Q. Do you have those with you?

A. Yes, sir.

(Testimony of George D. Crane.)

Mr. Bender: May I see them?

(Whereupon, the articles were given to counsel.)

Mr. Lavine: Counsel, at the appropriate time I would like to take him on voir dire.

Mr. Bender: This is an appropriate time.

The Court: On his qualifications?

Mr. Lavine: Yes, your Honor.

The Court: All right.

Mr. Lavine: Are you a licensed chemist?

The Witness: No, sir. I know of no such term, sir.

Mr. Lavine: Well, do you hold any degrees in chemistry?

The Witness: Yes, sir.

Mr. Lavine: Where from?

The Witness: From the Army Institution of Technology, Chicago, Illinois.

Mr. Lavine: You said that you had made investigations [120] of spirits. What kind of spirits have you made investigations of?

The Witness: Well, I presume most all kinds of alcoholic spirits in existence, sir; used in this country anyway.

Mr. Lavine: Well, have you made them of any produced in any foreign countries?

The Witness: Yes, sir.

Mr. Lavine: And what do you call the spirits?

The Witness: What do you call spirits?

Mr. Lavine: Yes.

The Witness: Well, spirits is a mixture of ethyl

(Testimony of George D. Crane.)

alcohol, water, and such congenierics as may have been produced during the fermentation and distillation of the alcohol.

Mr. Lavine: Well, is 3.2 per cent a spirit?

The Witness: It is not considered a spirit, as far as the law is concerned, I believe, unless it is produced at a premises which has a still in connection therewith.

Mr. Lavine: But it is a spirit, is that correct?

The Witness: Yes, sir. It has alcohol in it.

Mr. Lavine: In other words, any substance that has alcohol in it is a spirit?

The Witness: Anything, I think, in the alcohol laws above one-half of one per cent is considered spirits.

Mr. Lavine: And perfume, is that a spirit?

The Witness: Perfume is normally made with a denatured [121] alcohol.

Mr. Lavine: Well, is it a spirit?

The Witness: Yes, sir.

Mr. Lavine: And are medicines that contain any alcohol, are those spirits?

The Witness: Well, the terms confuse me a bit. I am not sure just what answer I would give to that. I can qualify it in this way: if it has a certain quantity of harmful or such ingredients as will make it, let's say, unpotable, it is not classed as spirits although it does have alcohol in it.

Mr. Lavine: Well, I take it that you didn't do any examining of any liquids for spirit content in the prohibition days, did you?

(Testimony of George D. Crane.)

The Witness: I had very little experience during those days. I think prohibition was in existence when I went to work for the Government.

Mr. Lavine: That was 1932?

The Witness: Yes, sir.

Mr. Lavine: Where have you made your investigation of liquids to determine if they had spirits in them?

The Witness: I made them at the Government offices at all of these distilled spirits plants of which I had control; and also in the Government laboratories in San Francisco.

Mr. Lavine: And did that experience enable you to tell [122] how old the liquid was?

The Witness: No. I don't believe I could state that.

Mr. Lavine: Did it enable you to tell where the liquid came from?

The Witness: To a degree I think I can tell, yes, sir.

Mr. Lavine: Well, could you tell from that experience whether it was made in the United States or made abroad?

The Witness: No.

Mr. Lavine: Could your experience tell you how long it had been made, what the age of it was?

The Witness: I said no to that.

Mr. Lavine: Could you tell from what substance it was made?

The Witness: By organoleptic and chemical examination you can tell usually what type of dis-

(Testimony of George D. Crane.)

tilling apparatus was used in producing it. However, you cannot define any particular raw substance from which it was made unless you have the still information at hand.

Mr. Lavine: As I understand your testimony, you had charge of a number of licensed stills.

The Witness: Yes, sir.

Mr. Lavine: What number, if any, of unlicensed stills have you ever examined?

The Witness: None, except, let's say, as museum pieces.

Mr. Lavine: I think that is all, your Honor. Thank you. [123]

Mr. Bender: Your Honor, may I approach the witness in order to obtain two bottles that he brought with him?

The Court: Yes.

Mr. Bender: If the Court please, the Government requests that the clerk mark as Government's Exhibits Nos. 18 and 19 for identification these two bottles.

The Court: They may be marked for identification as Exhibits 18 and 19 for identification only.

(The exhibits referred to were marked Plaintiff's Exhibits 18 and 19 for identification.)

Mr. Bender: And would you please place each of the two proposed exhibits before the witness?

(Whereupon, the two exhibits were placed before the witness.)

(Testimony of George D. Crane.)

Q. (By Mr. Bender): Would you examine Government's proposed Exhibits Nos. 18 and 19, and tell us where you first saw each of those exhibits, if you have seen them before?

A. They were delivered by mail to the Treasury Department laboratories in San Francisco on the 19th of September, this year.

Q. Did you receive them then at that time?

A. Yes, sir.

Q. What if anything did you do with each of them? A. They were given——

Mr. Lavine: May all of this testimony be subject to [124] my basic objection?

The Court: You may have a running objection to this testimony.

Mr. Lavine: Thank you. That is, in violation of the Fourth and Fifth Amendments of the Constitution of the United States.

The Witness: The labels that were attached to the bottles were given laboratory numbers. The bottles were placed in the locked room where we keep samples. And the next day I removed the samples from this locked room, analyzed them, sealed them and returned them to this locked room, where they have been until I was requested to bring them to this court.

Q. (By Mr. Bender): Would you examine Government's Exhibit No. 8 for identification and tell us what that was from?

A. It is marked "from aging barrel" on the

(Testimony of George D. Crane.)

label. An analysis was made. Proof of the material is 88.1 degrees in alcohol and 33.6 grams of acetic acid per hundred meters. And there is no carmel. The color is $5\frac{1}{4}$ brown on the Lovabond scale.

Q. Did you also make a similar test concerning Government's Exhibit No. 19 for identification?

A. Yes, sir. The same test.

Q. Did you make an organoleptic test? [125]

A. On both of these.

Q. Based on these tests that you made of each of the proposed Government's exhibits that are before you, do you have an opinion concerning whether or not they are distilled spirits?

A. They are distilled spirits.

Q. Mr. Crane, is there a difference between dextrose and corn sugar?

A. Corn sugar is practically all dextrose.

Q. And in their usage as an ingredient in the manufacture of a distilled spirit is there any significant difference between the two of them?

A. No.

Mr. Lavine: I object. There has been no foundation laid as to this line of questioning.

Mr. Bender: This witness testified that he has had experience for years in the control of brandy distilleries throughout Southern California. Surely he will know what ingredients are used in the manufacture of distilled spirits, and that is what I am asking him.

The Court: Overruled.

Mr. Bender: You may answer the question.

(Testimony of George D. Crane.)

The Witness: I am afraid I have missed it now, sir.

The Court: Read the question.

(Question read.) [126]

The Witness: No.

Q. (By Mr. Bender): Are malt syrup and yeast ingredients for making distilled spirits?

A. Yes, sir.

Q. You testified that in your opinion each of the samples before you is distilled spirits. Do you have an opinion as to whether they are fit for human consumption? A. They are.

Q. And upon voir dire examination by opposing counsel, you went into the question of, for example, perfumes being spirits. What is the distinguishing feature then insofar as perfumes and the exhibits before you are concerned?

A. Articles such as perfumes and medicines are not presumed to be potable; fit for human consumption, in other words.

Q. Is ordinary house sugar—in other words, cane or beet sugar—an ingredient for the making of distilled spirits? A. No, sir.

Mr. Bender: Your Honor, at this time the Government moves that the Court admit into evidence the Government's Exhibits Nos. 18 and 19 for identification.

Mr. Lavine: To which we object, your Honor, at this time for several reasons.

The Court: I am going to have to sustain the

(Testimony of George D. Crane.)

objection [127] at this time because I think you should establish the fact that these particular samples were sent to the chemist. You had better call your witness back to the stand who sent your samples and have them identified.

Mr. Bender: We have no further questions.

Cross-Examination

By Mr. Lavine:

Q. What is the formula for distilled spirits as contained in these Exhibits 18 and 19?

A. About 44 per cent alcohol CTH 50H, and the balance is water and an undetermined amount of feral—probably propyl alcohol and fusel oil; also, acetic acid.

Q. Do either of these bottles contain any croton oil? A. No, sir.

Q. Do you know of any alcoholic spirits of a similar kind that contain croton oil?

A. No, sir. I haven't run into croton oil since the Army days.

Q. Well, what is croton oil?

A. I don't know what the formula is, sir. I know the effect of it.

Q. Well, you haven't ever found it distilled out of any distillate, have you? A. No, sir.

Q. Now, in connection with these samples, did you [128] examine them separately?

A. Yes, sir.

Q. Did you find them different from each other?

(Testimony of George D. Crane.)

A. To a certain degree, yes, sir.

Q. What did you find different about them?

A. There was five-tenths of a degree proof difference between sample 18 and sample 19. There was also a difference in the amount of total acids, which is mostly acetic acid. There is more in 19 than in 18. However, the difference is minor, I would say.

Q. Was there a difference in the color?

A. No, sir. The colors were identical in both cases.

Q. Well, now, when you took the sample how much of the sample of 18 did you take to make your test?

A. I think I didn't use any more than—well, of course, I used the whole bottle in obtaining the proof, but it was put back in the bottle and then subsequent amounts were taken to determine the proper color reading, and also for the determination of the acids.

Q. All right. Now, you have told us you poured out the whole bottle after you got it, is that right?

A. Put it into a hydrometer cylinder, yes, sir.

Q. And how long did you keep it in the hydrometer cylinder?

A. Oh, I doubt if it was in the cylinder more than [129] two minutes.

Q. Now, did you put any burner under it in any way? A. No, sir.

Q. Did you taste any of it? A. Yes, sir.

Q. And how much of it did you taste?

(Testimony of George D. Crane.)

A. Just enough to put on my tongue. I put it on my tongue and spat it out.

Q. Did you do it on a spoon* or just from the bottle?

A. I poured a little into the beaker from the hydrometer, graduated it.

Q. I see. And in your experience in connection with distilleries did you ever have the occupation of being a whiskey taster or a taster of brandy?

A. No, sir. But I have done quite a bit of it.

Q. Well, I am not asking you about your personal habits now. I am talking about your profession.

A. I consume very little spirits personally.

Q. Professionally you would say you have tasted a lot of it?

A. In tasting of distilled spirits and things of this kind, if you want to keep your ethics pure you don't swallow it. You spit it out after you have tasted it.

Q. And did you spit it out after you got through testing this? [130]

A. I sure did, yes, sir.

Q. Did you find this pretty good whiskey as whiskey goes?

A. I wouldn't hand it such a high mark, no, sir.

Q. I see. Well, could you tell how old it was from the taste?

A. I think from the fact that——

Q. From the taste, now, just from the taste. Confine yourself to that, please.

(Testimony of George D. Crane.)

A. I have an opinion but I wouldn't state for a positive fact.

Q. Well, have you tasted 4-year-old whiskey?

A. Yes, sir.

Q. And 8-year-old whiskey? A. Yes, sir.

Q. What is the difference between the taste of those whiskeys?

A. The taste is a rather indefinable substance known as the ester content. That's the way I would describe it. The older the whiskey, up to a point, has a more of a bouquet due to the ethyl acetates and the higher alcohols which have combined with the char to produce the bouquet or ester content of the whiskey.

Q. Well, after eight years it doesn't add anything to it, isn't that a fact? [131]

A. I don't believe it does, no, sir.

Q. Now, could you tell whether either of those was locally or foreign-made? A. No, sir.

Q. Could you tell whether it had been brought in on a boat or whether it had been on land all the time? A. No, sir.

Q. Now, what did you do first? Did you taste it first before you poured any of it into any other container for any test?

A. No. I always obtain the proof first.

Q. And that is done with what kind of an instrument?

A. It's a long, thin cylinder possibly an inch and a quarter in diameter and approximately this high (indicating) with a base on it so it won't fall. The material is poured in it and the crude hydrometer is lowered into it. The apparent proof is read

(Testimony of George D. Crane.)

from the stem of the hydrometer. The hydrometer is withdrawn and the thermometer is then placed in the liquid. When you have both the apparent proof and the temperature, then by reference to the manual you get the true proof; in other words, the proof as reduced to 60 degrees Fahrenheit.

Q. Well, in other words, you made the proof test by referring to some manual after you had put this liquid into a hydrometer, is that correct? [132]

A. No; after I put the hydrometer into the liquid.

Q. I am reversed. After you put the hydrometer into the liquid. It wasn't your own determination but the determination of a book, is that right, that you examined? A. Yes, sir.

Q. And it was based on figures in that book that you made this calculation, is that correct?

A. Yes, sir.

Q. Did you make some other test, then examine the book to determine other features of this content?

A. No. The rest of them were made by pure chemical analysis and physical analysis.

Q. Except the tasting. That wasn't done by pure chemical analysis, was it? A. No, sir.

Q. Did you taste each of the bottles separately?

A. Yes, sir.

Q. How soon apart did you taste the two separately?

A. I believe I analyzed one sample and then completed the analysis on that, which took approxi-

(Testimony of George D. Crane.)

mately three-quarters of an hour, and then that sample was closed and the other sample was taken and the analysis repeated. So there was probably a range of an hour between the two tastings.

Q. Now, after you tasted the two substances, what then did you do? [133]

A. Well, except for this small amount that had been poured in the beaker for tasting purposes the entire amount had then been returned to the bottle from which it came, and an allocated portion was taken out for the determination of the total acidity of the material. That was the next step.

Q. How did you test for the acidity?

A. That is a method where the—did you want me to go through identical steps?

Q. I want you to tell us how you tested for acidity.

A. 25 millimeters of the distilled spirits are placed in a large porcelain dish which holds about 400 ccs., or I would say 10 or 12 ounces, about the size of a large flat soup bowl; and into this, before the whiskey is added, 250 millimeters of water is added and two millimeters of phenolphthalein, which is an acid basic indicator. Then the distilled water is neutralized by adding a drop or so of sodium hydroxide so you get a faint pink color to the water. Then the 25 millimeters of distilled spirits is added. This is a very accurate measurement made with a pipette, as it is called. This is permitted to run into the flat dish in which the water has been placed, the neutralized water, and of course as soon as the dis-

(Testimony of George D. Crane.)

tilled spirits hits it the pinkish color disappears due to the fact that an acid radical has been added to the liquid. Then when the entire amount has been added to the water by means of a [134] burette, the sodium hydroxide is carefully run, with constant stirring, into this dish until this pinkish color reappears. Then the amount of sodium hydroxide is read on the burette, which is a long tube with markings on it, and this is an indication of the amount of sodium hydroxide it took to neutralize the amount of the acid which was introduced into the water by the whiskey. And then from this the factor is used which gives us the acetic acid or acid content of this amount of whiskey, and since all this is on a hundred cc. basis, multiplied by 4, and you get the acid content of 100 ccs. Multiply that by 1,000 and you get the grams of total acidity per hundred liters.

Q. Now, what is a milliliter?

A. Why, it's the standard volume measurement that is used by chemists throughout the world—one-thousandths of a liter.

Q. Well, we don't have liters around here and the measurements we talk about are a little different. Could you tell us, without any reference to any book or anything, what a milliliter is in terms of a teaspoon?

A. Oh, I think a milliliter would probably be two and a half—or, a teaspoon would be about two and a half milliliters, roughly.

(Testimony of George D. Crane.)

Q. Or, in terms of, say, an ounce? A milliliter would be what portion of an ounce? [135]

A. It's about 29½ milliliters to a fluid ounce.

Q. Now, you didn't pour any of that content back in the bottle, did you? A. No, sir.

Q. Now, you testified that spirits are made out of corn sugar. Spirits can be made out of all kinds of substances, can't it? A. No, sir.

Q. You didn't make any analysis of Exhibits 18 or 19 to determine whether they were made from yeast, did you? A. No, sir.

(Whereupon, counsel consulted with the defendant.)

The Court: Mr. Lavine, while you are consulting with your client I think we will take our morning recess.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you not to discuss this case with anyone or allow anyone to discuss it with you; not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until five minutes after 11:00.

(Short recess.)

The Court: Is it stipulated that the jury is present and in the box? [136]

Mr. Lavine: So stipulated, your Honor.

(Testimony of George D. Crane.)

Mr. Bender: So stipulated, your Honor. And the defendant is present in court.

The Court: Any other questions, Mr. Lavine?

Mr. Lavine: No, your Honor.

Redirect Examination

By Mr. Bender:

Q. Mr. Crane, do you have an opinion concerning the slight difference or minor difference between the two samples in their color?

A. The color was the same in both of the samples.

Q. I believe you testified there were minor differences between them.

A. A slight difference in the acetic acid content.

Q. Do you have an opinion concerning the reason for this difference?

A. The sample, Exhibit No. 19, had a little higher acid content, which led to my conclusion that it probably had a little more aging than the sample, Exhibit No. 18.

Q. In other words, it had been made earlier?

A. Well, I don't know about that. The chemical analysis indicates that it has additional aging to it. How it was obtained, of course, I don't know.

Q. Do you notice any difference in the apparent color between the two samples before you in the small bottles and [137] the large jugs which are Government's Exhibits Nos. 1 and 2 for identification, which are on the floor?

(Testimony of George D. Crane.)

A. I am satisfied that if the liquid in the jugs was compared with these in a cylinder of like dimension they would have the same color.

Q. In other words, if you poured——

Mr. Lavine: I object to that as calling for speculation. The witness says that in order to determine that he would have to measure it and there is no foundation made to show he has measured it.

The Court: Overruled.

Q. (By Mr. Bender): In other words, then, if an empty bottle the size of the small bottle on the desk before you were filled with liquid from one of the larger jugs it would be the same color as the small bottle before you? Is that correct?

A. I think so, yes.

Q. It is just in a larger jug and that is why it looks darker? A. Yes.

Q. Do you have any opinion concerning the age of the distilled spirits in the bottles, Government's Exhibits 18 and 19 for identification, which are before you?

A. I have a qualified opinion which I wouldn't like to have my reputation depend on; but I would say—— [138]

Mr. Lavine: Just a minute. You haven't been asked for that.

The Court: Sustained. He is purely speculating.

The Witness: I am sorry.

Mr. Bender: I am asking him if he has an opinion.

The Court: He says yes, but he qualifies it.

(Testimony of George D. Crane.)

Mr. Bender: Would not that go to the weight of the opinion?

The Court: I have sustained the objection.

Mr. Bender: No further questions.

Mr. Lavine: Your Honor, I would like to ask one question that isn't proper rebuttal.

Recross-Examination

By Mr. Lavine:

Q. What is croton oil used for?

A. To make anything unpotable.

Q. And that is, to be undrinkable when you say unpotable?

A. That is what I mean, yes, sir.

Q. And it is used as a drastic purgative?

A. Right.

Q. If someone took two bottles that were empty and poured some like substance into the two bottles, that you see in the large jugs, from which these samples were taken, they would have a similar color, wouldn't they? [139]

A. Yes.

Q. It would be impossible to distinguish those from the bottles that were brought in, isn't that right?

A. I fear you have confused me a little, sir.

Q. Well, let me withdraw that last question.

The matter of color is a matter of opinion, isn't it?

A. No, no. The determination of color is an exact comparison with the standard.

(Testimony of George D. Crane.)

Q. Well, do different people see color differently?

A. Not if it is made with the Lovabond color——

Q. Well, you are talking about an exact measure now, aren't you? A. Yes, sir.

Q. The people are looking at two substances. There is a variation in what the color is, isn't there, in the opinion of the person examining it? The substance? A. That's correct.

Q. What is color?

A. Well, color is the result of the refraction or reflection of light through any substance. And it is determined by the absorbance of the particular wave length of the light which this material has.

Q. And that wave length is microscopic in its difference, isn't it? When there is a different shade of color it is small, isn't it? [140]

A. Spectruminically speaking it is quite a narrow range, yes, sir, for color determination.

Q. And in order to test color scientifically you either have to have a measuring instrument—is that correct? A. That's right.

Q. ——or you have to burn the substance and test it under a spectrograph or a spectroscope, isn't that right?

A. It isn't burned; just an absorbent spectrum is obtained.

Q. That is, the measurement of the amount of light that reflects, isn't that correct?

A. That is correct.

(Testimony of George D. Crane.)

Q. Now, in order actually to tell whether these bottles are the same in color you would actually have to make a scientific examination to be accurate, is that right? A. That is right.

Q. And you didn't make any such examination, did you? A. Not on that bottle, no.

Mr. Lavine: That is all.

Mr. Bender: No further questions of this witness.

The Court: You may step down.

(Witness excused.)

The Court: May this witness be excused?

Mr. Lavine: Yes, your Honor.

The Court: You may be excused. [141]

Mr. Bender: The Government calls Charles O. Jones as its next witness.

CHARLES O. JONES

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please? State your name.

The Witness: Charles O. Jones.

Direct Examination

By Mr. Bender:

Q. Mr. Jones, what is your profession or occupation?

A. I am an investigator for the Alcohol & Tobacco Tax Division of the Treasury Department.

(Testimony of Charles O. Jones.)

Q. Directing your attention to on or about September 15, 1955, what did you observe on that occasion, if anything, with reference to this case?

A. About midnight we started—we were staked out at 1011, 1011½-223rd Street, Torrance. We staked out until around 6:00 o'clock in the morning, when I joined Investigator Warner.

Mr. Lavine: I object to that as being incompetent, irrelevant and immaterial with regard to staking out. I don't see any relevancy to that.

The Court: Is this just cumulative testimony or something new? [142]

Mr. Bender: There will be new portions of the testimony. However, if I may direct a question to the witness, I think I can eliminate a portion of the cumulative material.

The Court: I don't think it is necessary to accumulate any more testimony. You have been about a day and a half. I don't know how we are going to finish this case in two days.

Mr. Lavine: May we approach the bench, your Honor?

The Court: Yes.

(Whereupon, the following proceedings were had out of the hearing of the jury and the defendant.)

Mr. Bender: Your Honor, it is apparent to counsel for the Government that counsel for the defendant is intending to make an issue of the credibility of the Government's witnesses, specifically those

(Testimony of Charles O. Jones.)

who will testify or have testified concerning the obtaining of Government's Exhibits 1 and 2 for identification, in the hope that counsel will establish that these were not in fact ever obtained. And it is necessary that the Government put on each witness for the Government who participated in the obtaining of these samples in order to corroborate the testimony of the other agents who testified about the obtaining of samples. And I further offer to prove that this witness will testify that he was the one who took Government's Exhibits 1 and 2 for identification and placed them in the trunk of his car and [143] later took them to the Government safe and——

The Court: Well, what did you want to say?

Mr. Lavine: It is cumulative, your Honor. As far as the latter part of this testimony is concerned, I think that——

The Court: Well, you objected to the introduction of these two small bottles of liquid and I sustained the objection because I didn't think they had been tied up as to being sent to the——

Mr. Bender: That will be tied in by Mr. Awrey.

Mr. Lavine: That is another witness, your Honor.

Mr. Bender: This witness, your Honor, will testify——

The Court: Go ahead and proceed.

Mr. Lavine: What I am objecting to is all the investigation parts that have nothing to do with the evidentiary matter. I understood that your

(Testimony of Charles O. Jones.)

Honor was limiting him, which I have no objection to, as to what he put in the car and what he did at the investigation. But to take it back to the night before——

Mr. Bender: I think I can cut it down, sir.

The Court: All right.

(Whereupon, the following proceedings were had in the hearing and presence of the jury and the defendant.)

Q. (By Mr. Bender): Mr. Jones, did you participate in the search of the Ramsey premises located at 1011, 1011½ West 223rd Street, Torrance, California, on September 15, [144] 1955?

A. Yes, sir, I did.

Q. Directing your attention to the time that you had entered the premises, did you participate in a search of the smaller premises located at 1011½ West 223rd Street? A. Yes, sir.

Q. What did you do subsequent to your participation in the search of the smaller residence at 223rd Street? What did you observe?

A. We entered the—I entered the premises, the west driveway of 1011½ with Investigators Travis and Coughran. I got out of the car and approached the small building there. I looked around the yard first and then approached the small building, the dwelling house there at 1011½-223rd Street. I was joined by Investigator Bruce Awrey. And we entered that house and searched the house and never found anything in that small house.

(Testimony of Charles O. Jones.)

Q. What did you do after your search of the house?

A. I went outside, and Investigator Warner was standing by a locked garage door. Well, it looked like a garage door. It was two swinging doors that opened up and locked in the middle with the padlock.

Q. Yes. Continue.

A. Mr. Ramsey came outside with a key and opened that door and we went inside. I saw two 5-gallon water [145] bottles full of a brown-colored liquid which appeared to be whiskey.

Mr. Bender: Would the clerk please hand the witness Government's Exhibit 15, one of the photographs?

Q. (By Mr. Bender): Mr. Jones, would you examine Government's Exhibit 15 and tell us if that portrays—well, tell us what that portrays.

A. That is the garage that I entered first with Investigator Warner.

Q. Yes. And you were in the process of telling us what you found in the garage.

A. I saw two 5-gallon water bottles full of this brown-colored liquid which appeared to be whiskey. And they were full. I saw——

Mr. Lavine: I move to strike the word "whiskey."

The Court: He said "appeared to be." The objection is denied.

The Witness: They had no evidence of tax payment; no strip stamps.

(Testimony of Charles O. Jones.)

Mr. Lavine: I move to strike that as volunteered statement.

Mr. Bender: Your Honor, if it is relevant, in the Federal Courts——

The Court: Denied.

The Witness: I saw two barrels, 50-gallon wooden barrels on a rack, each on its own rack in the back of the [146] building, which would be on the east side of the building.

Mr. Bender: Excuse me, Mr. Jones.

Would the clerk please hand the witness all the other photographs which are in evidence?

Q. (By Mr. Bender): As you testify, Mr. Jones, if it's possible, would you look through the exhibits which are now before you and point out and identify the exhibit which refers to anything which you say?

A. These two barrels were lying on their side facing each other, and they had pipes coming out of them. And the pipes, when I examined them closely, they had a little framework over the pipes and there was a coil running from each pipe to the other pipe. And underneath that was a gas jet burner.

Q. Was that in Government's Exhibit 12?

A. Yes, sir.

Q. What else did you do or see?

A. I saw several cases on the floor which contained one-gallon jugs of the same brown-colored liquid which appeared to be whiskey, and never had any strip stamps denoting tax payment.

(Testimony of Charles O. Jones.)

Q. By that you mean it had no stamps whatsoever affixed to any of the bottles or jugs?

A. Yes, sir. I went into the other room, which was an adjoining shed to the south of that, which had an adjoining [147] door, and I saw five and a half 100-pound bags of sugar.

Q. Is that in Government's Exhibit 13?

A. Yes, sir.

Q. Does that properly portray the sugar to which you refer?

A. Yes, sir. Paper bags; 100-pound bags.

Q. What did you do then?

A. I saw several barrels in there, approximately six or eight. I saw a bucket. I saw a sink with a hose leading outside, out to the west side of that shed. I saw a hot water heater. And I saw a thermometer.

I also saw in that room a shelf built up on the side of the shed which contained an instrument which I didn't know what it was at the time. It was a two-quart Mason jar with a wire screen around it, setting beside a transformer—looked like a high-power transformer.

That is all I saw inside there that I can recall.

Q. What did you do after you saw these items?

A. Mr. Ramsey was standing outside of the shed. I went out and I was curious to find out what that——

Mr. Lavine: I move to strike that answer as to his curiosity.

(Testimony of Charles O. Jones.)

The Court: It may go out about his being curious.

Q. (By Mr. Bender): What did you do?

A. I went outside and talked to Mr. [148] Ramsey.

Q. What did you say to him and what did he say to you, if anything?

Mr. Lavine: I object to that. No proper foundation.

Q. (By Mr. Bender): Who was present besides yourself, if anyone, when you had this conversation with Mr. Ramsey?

A. No one that I recall.

Q. Approximately what time did the conversation take place? How long after you had arrived at the premises did the conversation take place?

A. Approximately 20 minutes.

Q. Where did the conversation take place?

A. Right outside the shed.

Q. What was said in that conversation?

A. I asked him what that thing was on the wall with the transformers and the electrodes running into the jar. And he said it was an airpurifier. And he said—I asked him if it killed the odor of fermenting mash, and he says, “Yes, it helped.”

That is all that was said.

Q. What did you do after this conversation?

A. I went back into the shed, and Investigators Warner and Coughran were opening the boxes and **looking into the jugs**. I opened a bottle, one of the jugs, and smelled the liquid inside and it smelled

(Testimony of Charles O. Jones.)

like whiskey. Investigators Warner and Coughran—or, Investigator Coughran put a hose into [149] the left barrel and extracted a gallon of whiskey.

Q. Where did he place this gallon of whiskey that he extracted?

A. Into a one-gallon jug, and placed it on the floor. And Investigator Warner scratched it with his ring. And I scratched it with his ring.

Mr. Bender: If the court please, may I place the two exhibits, Exhibits 1 and 2 for identification, before the witness?

The Court: Yes.

(Whereupon, the two exhibits were placed before the witness.)

Q. (By Mr. Bender): Mr. Jones, would you inspect Government's Exhibits 1 and 2 for identification and tell us if you have ever seen either of them before? And, if so, where?

A. I saw both of these jugs before.

Q. When and where?

A. I saw them inside of the shed. And they are the ones—that one is the one that was extracted by Investigator Coughran and marked by Warner and myself.

Q. By "that one," you mean Government's Exhibit 1 or 2 for identification? It is marked there.

A. Exhibit No. 1.

Q. Where did you first see Government's Exhibit 2 for [150] identification?

A. It was extracted from a case by Investigator

(Testimony of Charles O. Jones.)

Warner and marked by Investigator Warner and myself.

Q. Then at the time you first saw it, did it have the same color of liquid in it that it now has?

A. It did.

Q. It was not then filled up by Investigator Coughran?

A. Exhibit 2 was not filled up by Investigator Coughran.

Q. At the time that you first saw Exhibit No. 2, did it contain a strip stamp or any stamp over the cap?

A. No, sir.

Q. Who was present at the time that Exhibit No. 1 for identification was obtained, withdrawn from the barrel by Investigator Coughran?

A. Coughran, Warner and myself.

Q. Was the defendant present?

A. No, sir.

Q. What did you do after the two exhibits were first seen by you at that time?

A. After we marked them, I put them in a cardboard carton and carried them to the Government car where I locked them in the trunk.

Q. Was the defendant present at the time you did this? [151]

A. No, sir.

Q. What, if anything, did you do with the two Government Exhibits, Exhibits Nos. 1 and 2 for identification, after you marked them and after you carried them and placed them in your trunk? Where did you take them?

A. Well, I stored them—the next morning I

(Testimony of Charles O. Jones.)

stored them in Room 850, the Government locker there, a safe.

Q. You then did not return to the Government offices that evening?

A. No, sir. I was tired.

Q. How long had you been on duty continually?

A. Approximately 33 hours.

Q. After you stored them in the Government locker the following morning, when is the next time that you saw Exhibits 1 and 2 for identification?

A. When I opened the safe again.

Q. When was that?

A. Oh, during the day some time I opened the safe again and looked inside for some other stuff pertaining to another case, and I saw these.

Q. Did you participate in the taking of the samples which were testified to by the chemist, Mr. Crane, the two small samples which are before you?

A. No, sir.

Q. Directing your attention now back to September 15, [152] 1955, and the Ramsey premises, were you present during a conversation between Mr. Awrey and the defendant, a conversation which concerned what capacity the still had?

A. Yes, sir.

Q. What was said at that time?

Mr. Lavine: I object to that. There is no proper foundation. There is no showing that the response was voluntary.

Q. (By Mr. Bender): Who else was present

(Testimony of Charles O. Jones.)

there than Mr. Awrey and the defendant and yourself? A. No one else.

Q. Approximately what time did this conversation occur? A. Approximately 1:00 o'clock.

Q. What was said at that time?

Mr. Lavine: I object to that. There is no showing that the response was voluntary; violation of the Fourth and Fifth Amendments of the Constitution of the United States.

The Court: Overruled.

The Witness: Investigator Awrey asked Mr. Ramsey what capacity the still was. Ramsey said 100 gallons.

Q. (By Mr. Bender): Did you have any conversation then with the defendant?

A. I asked Mr. Ramsey——

Mr. Lavine: Same objection, your Honor.

The Court: Same ruling. [153]

The Witness: I asked Mr. Ramsey how long it had been since he had operated the still and he said about a month.

Q. (By Mr. Bender): Did this conversation occur before you obtained the sample or after?

A. After.

Mr. Lavine: Same objection; violation of the Fourth and Fifth Amendments.

The Court: Overruled.

Q. (By Mr. Bender): Did you answer?

A. It occurred afterwards.

Q. Did you assist in the destruction of the vari-

(Testimony of Charles O. Jones.)

ous materials and items that were found on the Ramsey premises? A. I did.

Q. Did you subsequently have any conversation with the defendant in the house at 1011-223rd Street?

A. Yes, sir. After the still and all of the parts of the still apparatus were destroyed and all the liquor, I asked the defendant——

Mr. Lavine: I object to that as no proper foundation; no showing that the response was voluntary; violation of due process and violation of the Fourth and Fifth Amendments of the United States Constitution.

Q. (By Mr. Bender): Where did the conversation take place? A. In the living room. [154]

Q. Who was present besides yourself?

A. Just myself.

Q. Was the defendant present?

A. Oh, the defendant, yes, sir.

Q. Approximately what time did the conversation take place? A. Approximately 3:30.

Q. What did you say to the defendant?

Mr. Lavine: Same objection, your Honor; same grounds as specified.

The Court: Same ruling.

The Witness: I asked Ramsey if he was willing to give me a financial statement.

Q. (By Mr. Bender): What did he say?

Mr. Lavine: Same objection, your Honor; violation of due process.

(Testimony of Charles O. Jones.)

The Court: What does that have to do with this case?

Sustained on the ground of immateriality.

Mr. Bender: All right, your Honor.

You may cross-examine.

Cross-Examination

By Mr. Lavine:

Q. You said you were present when the destruction of the various items took place?

A. Yes. [155]

Q. Did you assist in the destruction?

A. Yes.

Q. And how many bottles did you break up?

A. I don't recall.

Q. Did you break up everything except two bottles that you took? Did you and your fellow officers break up everything relating to any liquid contents except the two bottles that you took?

A. I can't testify to what they broke up. I only——

Q. Did you see any liquid after, except the two bottles that you say you took, did you see any liquid left there?

A. No, sir.

Q. Now, what time did you leave the place?

A. Approximately 4:00 o'clock.

Q. Were you one of the two last persons to leave? Or were you the last person to leave?

A. I don't know.

Q. Did you see any of your fellow officers there

(Testimony of Charles O. Jones.)

at the time that you left? A. I don't recall.

Q. What did you put on any bottles that were taken?

A. On the two samples that we extracted I used Investigator Warner's ring and scratched "C.O.J." on them.

Q. And who was present when you scratched "C.O.J." on there? [156]

A. Investigator Coughran and Investigator Warner.

Q. Now, did you see Officer Linder there?

A. When we took those samples?

Q. Yes. A. No, sir.

Q. Did you see Officer Linder there at any time?

A. Later in the day.

Q. Did you see any samples that he took?

A. No, sir.

Q. Did you see any initials that he put on any samples? A. No, sir.

Q. What time did you destroy the bottles and articles that you destroyed? What time of day was it?

A. It must have been about 2:30, 3:00 o'clock, somewhere along there.

Q. Now, did you hear any officers call out what was being taken or what was being destroyed?

A. Yes, sir.

Q. And did you hear anyone call—did you hear someone call out that 40 gallons were destroyed?

A. No, sir.

Q. Did you hear anyone call out that 30 gallons

(Testimony of Charles O. Jones.)

were destroyed? A. No, sir.

Q. Or 38 gallons? [157] A. No, sir.

Q. Did you hear anyone call out what number of gallons had been destroyed? A. No, sir.

Q. You were planning to take some liquid in as evidence, weren't you?

A. We had already taken some liquid as evidence.

Q. And did you tell anyone that you had taken some liquid as evidence? A. No.

Q. When was the first time that you told anyone that you had two bottles of evidence?

A. The next morning when I brought them in.

Q. This safe that you have there, where is that safe?

A. It's in Room 850 at 417 South Hill, Los Angeles, Subway Terminal Building.

Q. Room 850 where?

A. Room 850, 417 South Hill.

Q. The Subway Terminal Building?

A. Yes, sir.

Q. And how big is that safe?

A. About four feet across and two feet thick and about six feet tall.

Q. And who else besides you has access to that safe? A. I don't know. [158]

Q. You aren't the only one who has access to it, are you? A. No, sir.

Q. And you weren't the only one on that day, were you, on the day that you brought these bottles in? A. No, sir.

(Testimony of Charles O. Jones.)

Q. When you say you brought them in, were there several other bottles in the safe at that time?

A. Yes, sir.

The Court: Just a minute. What kind of bottles? Perfume, liquor——

The Witness: Liquor.

The Court: Gallon bottles (indicating)?

The Witness: No, sir.

Q. (By Mr. Lavine): Well, you have bottles there in your safe, do you not?

Mr. Bender: Counsel for the Government objects to that question as being incompetent and irrelevant what he has in the safe.

The Court: The objection is sustained. Not what you have, but what was in at that particular time.

Mr. Lavine: It is preliminary. I am going to get to that.

Q. (By Mr. Lavine): You had 5-gallon jugs in your safe, did you not, on that date, September 15th or 16th, 1955? [159]

A. 5-gallon jugs?

Q. Yes. A. No, sir.

Q. No other jugs in there?

A. There were other jugs in there, yes, sir.

Q. What size were they?

A. Quarts, and I think there was possibly one or two one-gallon jugs.

Q. And no 5-gallon jugs? You are testifying under oath now. No other 5-gallon jugs on that date?

A. You mean 5-gallon water jugs full of whiskey?

(Testimony of Charles O. Jones.)

Q. I didn't ask you if they were full of whiskey. I asked you if you had 5-gallon jugs. Do you understand my question?

A. I didn't know whether you meant five one-gallon jugs or one 5-gallon jug.

Q. I am talking about the jugs the same size and type as you have right in front of you.

The Court: This is not a 5-gallon jug. This is a gallon.

Mr. Lavine: I am sorry. Gallon jugs. I am sorry. I stand corrected, your Honor, and I apologize.

Q. (By Mr. Lavine): One-gallon jugs the size of those jugs right there (indicating)?

A. Yes, sir. [160]

Q. You had others in the safe on that day, did you not? A. Yes, sir.

Q. Of the same type and kind, is that correct?

A. Of the jugs?

Q. Yes. A. I don't know, sir.

Q. Now, did those jugs that were in the safe have liquid in them? A. Yes, sir.

Q. And were they jugs with a similar colored material in them? A. Yes, sir.

Q. What time did you go to the safe that next morning? A. About 10 minutes after 8:00.

Q. Did anybody go with you?

A. The safe is in the squad room. They were all there. I mean, I can't recall who was there. But the investigators meet in the squad room in the morning.

Q. Now, did anybody go with you from the squad room or independently of the squad room to

(Testimony of Charles O. Jones.)

the safe when you opened it up and put these jugs in the safe? A. No, sir.

Q. Did anybody else see you put any jugs in the safe? A. I don't know, sir. [161]

Q. Did anybody ever tell you that they had seen you put these jugs in the safe? A. No, sir.

Q. You knew that some question arose about these jugs later on, didn't you? A. Yes, sir.

Q. And did you know that somebody had gone back, somebody from your office had gone back to the premises to try to find two jugs the night before? A. I didn't know that, sir.

Q. You didn't know that. You did learn about it later, didn't you? A. Yes, sir.

Q. And you learned, did you not, that somebody was supposed to have forgotten the two jugs and left them there, isn't that right? A. Yes, sir.

Q. And that one of your officers went back there to try to find those two jugs and he didn't find them, isn't that right? A. No, sir.

Q. Didn't you learn that somebody did go back from your squad and try to find those jugs on the night of September 15th and didn't find two jugs there that he was looking for? [162]

A. Let me qualify my answer. The first time——

Mr. Lavine: You can answer that question yes or no.

Will you repeat the question, please? Read the question.

(Question read.)

(Testimony of Charles O. Jones.)

Mr. Bender: If your Honor please, the witness may, of course, answer the question and then explain his answer.

The Court: Yes. Let him answer the question first and then explain his answer.

The Witness: Yes, sir. I learned that in court yesterday.

Q. (By Mr. Lavine): And you never learned about it before yesterday?

A. Now, specifically, the question was had I learned about the two men going back to look for the jugs?

Q. You never heard about that before yesterday? A. No, sir, not that.

Q. Now, how long did it take you to break up these various articles on the premises?

A. I would say about an hour, sir.

Q. Did you dump the sugar? A. I didn't.

Q. Did you take it away with you?

A. No, sir.

Q. Did you ever see any of this apparatus in operation? [163] A. No, sir.

Q. Did you put this so-called blower on, or air purifier? Did you try to put it on?

A. No, sir.

Q. Do you know whether it was working or not?

A. No, sir.

Q. Do you know when it had last been worked, if it ever had been? A. No.

Q. Did you see if you could smell anything or whether any fumes were killed by its operation?

(Testimony of Charles O. Jones.)

A. No.

Q. Did you go to these three garages or sheds with some other officer? A. Yes, sir.

Q. And at the time that you went there the doors were locked, were they? A. Yes, sir.

Q. You didn't have any search warrant yourself for the particular garages, did you?

A. The premises only, sir.

Q. The search warrant that we have here?

A. Yes, sir.

Q. Now, did you assist in making the inventory?

Mr. Lavine: May I approach the witness, your Honor? [164]

The Court: Yes.

Q. (By Mr. Lavine): Are you familiar with this inventory? A. I have seen it.

Q. And did you see it on September 15th?

A. Yes, sir.

Q. Did you assist in making it?

A. Only—not on this one, no, sir.

Q. Well, did you assist in making any inventory? Did you make some other notes from which this inventory was copied?

A. I started the inventory, yes, sir.

Q. And do you have your notes on that where you started it?

A. No, sir. I threw them away.

Q. Did you put down the number of gallons in the barrel on your notes? A. No, sir.

Q. Did you put the number of gallons that were

(Testimony of Charles O. Jones.)

destroyed on your notes? A. No, sir.

Q. Did you put the number of gallons that you took on your notes? A. Yes.

Q. And you destroyed that?

A. Yes, sir. [165]

Q. You do keep an extensive file, don't you, of all your work? Is that correct? A. Yes, sir.

Q. And you haven't kept that in the file of your case, is that correct? A. That's right.

Q. Now, when you took those two jugs on September 15th, were they in the exact same condition that they are now? A. Yes, sir.

Q. Now, in connection with this inventory, were these articles destroyed that are listed on the inventory as having been destroyed?

A. I didn't destroy all of this.

Q. Did you see it destroyed?

A. Not all of it, I didn't see destroyed.

Q. What part of that inventory did you not see destroyed?

A. I destroyed that brass pump and the motor and some of the barrels. And that is all.

Q. Did you see the other articles destroyed as listed here?

A. I saw several other barrels destroyed.

Q. And who was doing the destroying?

A. Investigators Travis, Warner and Coughran, and Bruce Awrey. [166]

Q. Did Investigator Warner make up this inventory in your presence? A. Part of it.

(Testimony of Charles O. Jones.)

Q. Did you see him give a copy of it to the defendant? A. No, sir.

Mr. Lavine: I would like to offer the search warrant, and the inventory in evidence as defendant's exhibit.

The Court: It may be received in evidence as Defendant's Exhibit A.

(The exhibit referred to was marked Defendant's Exhibit A and received in evidence.)

Q. (By Mr. Lavine): You said you had some conversation with the defendant about how long he operated the still. Who was present in that conversation? A. Investigator Bruce Awrey.

Q. Did you make any notes of it?

A. No, sir.

Q. Didn't you regard such a statement as important enough to make any notes on it?

A. Yes, sir.

Mr. Lavine: That is all.

Redirect Examination

By Mr. Bender:

Q. Do you have any difficulty in remembering the statement that was made? [167]

Mr. Lavine: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Bender: Counsel just asked if he regarded——

(Testimony of Charles O. Jones.)

The Court: You should have objected. If you would have objected, I would have sustained the objection.

Mr. Bender: No further questions of this witness.

(Witness excused.)

Mr. Bender: May we recall Mr. Awrey to the stand?

The Court: Yes.

Mr. Bender: Thank you. Mr. Awrey.

BRUCE AWREY

a witness called on behalf of the plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Bender:

Q. Would you examine the two small bottles which are before you which are marked Government's Exhibits Nos. 18 and 19 for identification only and read the labeling on them to yourself? Read everything on the label.

Mr. Lavine: Just a minute. I object to that as no proper foundation being laid for the reading of any label.

The Court: Doesn't the witness have a right to examine the thing he is going to identify? [168]

Mr. Lavine: He has a right to examine the substance. If your Honor please, what I am objecting

(Testimony of Bruce Awrey.)

to is that if this is for the purpose of refreshing his memory there is a foundation that has to be laid. If it is not——

The Court: Well, I don't know what the purpose is. The only question is, "Will you examine the exhibit."

Mr. Lavine: The question is will he examine the label, not the exhibit, your Honor.

The Court: The objection is overruled. Proceed.

Q. (By Mr. Bender): Mr. Awrey, have you had an opportunity and have you, in fact, examined each of Government's Exhibits 18 and 19 for identification? A. I have.

Q. Have you ever seen either of them before?

A. I have.

Q. Where did you first see them?

A. On September 16th Investigator Warner gave me these two samples, along with another sample, to mail to the United States chemist in San Francisco.

Q. And did you mail them to the United States chemist in San Francisco?

A. I mailed these three samples, these two and another sample, to the United States chemist in San Francisco.

Q. Did you obtain two samples from any jug or any other container? [169]

A. I did not. I received them directly from Investigator Warner.

Mr. Bender: No further questions.

(Testimony of Bruce Awrey.)

Cross-Examination

By Mr. Lavine:

Q. What time of the day did you receive the samples?

A. Oh, I don't remember exactly. Maybe——

Q. Morning or afternoon or night?

A. As I remember, it was around noon.

Q. How were the samples handed to you?

A. As one person would hand them to another. "Here's a couple of samples. Will you mail them for me?"

Q. Were they just like they are there, or were they in a box?

A. They were not in a box. They were individual samples; three of them; these two and another.

Q. Referring now to Government's Exhibit No. 18, did you see how much liquid was in the bottle when you took it?

A. Yes, I noticed.

Q. Well, was it the same amount of liquid as is here now?

A. Both bottles were fuller, up about this high (indicating), as I remember.

Q. Indicating to the rim of the bottle?

A. Yes. I can't testify exactly how full they were, [170] but, as I remember, all the bottle samples we send, they are fuller than this.

Q. Are you giving us your answer now because that is the general practice or because you remember specifically what was here?

(Testimony of Bruce Awrey.)

A. Because I know there was nothing unusual about the samples when they were given to me. If they had been low I would have noticed it.

Q. You didn't pay any particular attention whether it was the same or fuller or not, isn't that a fact now?

A. I do with all the samples. And I also make sure the cork is tight.

Q. I am just asking you now about the contents. You didn't pay any particular attention to the amount of the contents, isn't that right?

A. They were fuller than they are now.

Q. That doesn't answer my question. You didn't pay any particular attention to the contents, isn't that right?

A. Not particularly, except—

Mr. Bender: Excuse me. The Government objects to the question as asking for a conclusion whether he paid any particular attention.

The Court: Sustained. What difference does it make whether they were full or half full?

Mr. Lavine: There is important testimony that ultimately [171] will appear in this case.

The Witness: I would definitely say they were fuller than this because if they had not been full I would have asked the boys to fill them up. I have sent hundreds and hundreds of samples.

Q. (By Mr. Lavine): Did you pack these samples?

A. I did.

Q. What did you pack them in?

A. I packed them in a small carton.

Q. Where did the third one come from?

(Testimony of Bruce Awrey.)

A. That was another sample they were sending.

Q. Of these? A. Not of this.

The Court: In another case?

The Witness: Another case, sir.

Q. (By Mr. Lavine): Now, did you open the bottles and smell them? A. No, I didn't.

Q. Did you do that at the time? A. No.

Q. Did you make any examination to see whether it was the same color as any other liquids that you had around?

A. I made no examination whatsoever. I tighten the corks on all the samples to make sure they are tight.

Q. Did you see who poured the liquid into these two [171-A] bottles? A. I did not.

Q. Did you see where they were poured or know when they were poured?

A. No. I merely—the boys were busy and I merely packed them and mailed the samples to help them.

Mr. Lavine: I have no further questions of this witness.

Mr. Bender: No further questions of this witness.

The Court: Mr. Warner, when he was on the stand, testified that he had taken the samples from the big bottles.

Mr. Bender: I didn't go into that, and I should have.

The Court: Is Mr. Warner here?

Mr. Bender: Yes.

The Court: Let's clear up that point right now while we have a chance.

You may step down.

(Witness excused.)

M. F. WARNER

called as a witness on behalf of the plaintiff, having been previously sworn, was recalled and testified as follows:

Direct Examination

The Court: Mr. Warner, did you have anything to do with the obtaining of the samples from the larger jugs, which are Government's Exhibits 1 and 2 for identification?

The Witness: Yes, sir. [172]

The Court: What did you do in that regard?

The Witness: I took a sample from each of the jugs, placed it in an 8-ounce sample bottle, fixed the label thereto, initialed it and gave it to Mr. Awrey.

The Court: And from which jugs did you take the samples from? Can you tell us?

The Witness: Yes. This sample was taken from this jug.

The Court: That doesn't mean anything. Give us the number.

The Witness: Exhibit 19 was taken from Exhibit 2.

The Court: You took it?

The Witness: Yes, sir.

Q. (By Mr. Bender): What about Exhibit 18 for identification?

(Testimony of M. F. Warner.)

A. It was taken from Exhibit No. 1.

Q. Approximately what time of the day was it, do you recall, that you took the samples?

A. Some time after 8:00 o'clock.

Q. Was anyone else present when you took the samples? A. I don't recall.

Mr. Bender: You may cross-examine.

The Court: After you took the samples, what did you do with them?

The Witness: I marked them with my initials and then I handed them to Mr. Awrey for [173] mailing.

The Court: And you asked him to mail them for you?

The Witness: Yes.

The Court: Any questions?

Mr. Lavine: Yes, your Honor.

Cross-Examination

By Mr. Lavine:

Q. You said that you took the samples some time after 8:00 o'clock? A. Yes.

Q. What time after 8:00 o'clock?

A. Pardon?

Q. What time after 8:00 o'clock?

A. Some time before noon.

Q. What time?

A. I didn't make a note of the time.

Q. How many samples did you take?

A. One from each bottle.

(Testimony of M. F. Warner.)

Q. Did you take a third sample from some other bottle? A. Yes, sir.

Q. And you did that on the 16th, you say?

A. Yes, sir.

Q. Now, how did you pour the sample from one bottle into the other?

A. By removing the cap from the jug and the cap from the sample bottle and pouring it in. [174]

Q. And did you examine the bottle that you were pouring the sample into to see whether it was clean or not? A. Not particularly, no.

Q. Did you pour the liquid into Exhibit 19 from Exhibit 1 or Exhibit 2? A. Exhibit 2.

Q. Well, now, what did you do with the sample after you poured it into the bottle?

A. I sat the jug on my desk with the sample in front of it.

The Court: When did you make a writing upon the sample?

The Witness: After I poured all three samples out. In other words, I had three gallon jugs and three sample bottles. As I would pour it from this jug into the sample bottle I capped both bottles and placed the sample in front of the jug from which I was taking the sample.

Q. (By Mr. Lavine): Did you take the gallon jugs out of the safe? A. Yes, sir.

Q. And did you put them on some table or counter that you have there in the investigation room?

A. I put them on my desk.

Q. Where did you do the pouring, on the desk?

(Testimony of M. F. Warner.)

A. Yes, sir.

Mr. Lavine: May I approach the witness, your Honor? [175]

The Court: Yes.

Q. (By Mr. Lavine): Did you put the caps back on these bottles after you poured the sample in?

A. Yes, sir.

Q. And did you do anything else with the bottles?

A. After I put the sample in?

Q. Yes.

A. Well, I marked them, prepared a label for them.

Q. Now, then, how much liquid did you pour into the bottle?

A. Well, I always pour them full.

Q. Well, are you answering the question now because that is your general practice or do you remember what you did with these two bottles?

A. Not particularly, no.

Q. I see. Did you make any further test to see whether the liquid tasted like it was a distilled spirit?

A. No, sir.

Mr. Lavine: That is all I have.

Mr. Bender: The Government moves that Government's Exhibits Nos. 1, 2, 18 and 19 for identification only be admitted in evidence.

Mr. Lavine: I object. There has been no proper foundation. I object on the further ground that they were illegally seized in violation of the Fourth and Fifth Amendments. [176] violation of due process

(Testimony of M. F. Warner.)

clause of the Fifth Amendment of the Constitution of the United States.

The Court: The objection is overruled. They may be received in evidence.

The Clerk: Exhibits 1, 2, 18 and 19 in evidence.

(The exhibits referred to were marked Plaintiff's Exhibits 1, 2, 18 and 19 and received in evidence.)

Mr. Lavine: May I ask this witness one additional question?

The Court: All right.

Mr. Lavine: Did you make out the inventory in respect to the liquor that was taken and the liquor that was destroyed?

The Witness: Yes, sir.

Mr. Lavine: What time did you make out your inventory?

The Witness: I think I answered that before. About 3:15.

Mr. Lavine: I thought you had, but I wanted to be sure.

That is all.

The Court: You may step down.

(Witness excused.)

The Court: May I inquire how many more witnesses you have?

Mr. Bender: The Government has two more witnesses. They will not take so long as the others. At least, we anticipate [177] they will not.

The Court: Mr. Lavine, have you any authorities to support your instruction No. 6? If you have, I would like to have them.

Mr. Lavine: Yes, your Honor. I will have them for your Honor.

The Court: The first sentence is particularly what I am interested in.

Mr. Lavine: All right. Very well. I will have it at 2:00.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again, before we separate, it is my duty to admonish you not to discuss the case with anyone and not to allow anyone to discuss it with you; not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition we will now recess until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [178]

Wednesday, December 21, 1955—2:00 P.M.

The Court: Is it stipulated that the jury is present and in the box?

Mr. Lavine: So stipulated, your Honor.

Mr. Bender: So stipulated. And the defendant is present in court.

Your Honor, at this time may the Government and opposing counsel approach the bench briefly?

The Court: Yes.

(Whereupon, the following proceedings were had outside the hearing of the jury and the defendant.)

Mr. Bender: Your Honor, in the interest of shortening the trial we have refrained from adducing any testimony concerning another incident which occurred on these premises of the defendant on September 14, 1955. However, in the interest of, perhaps, an abundance of caution that it be established that the defendant was engaged as charged in the indictment in a business of a distillery the Government is contempating asking its next witness, interrogating its next witness concerning the transaction which occurred on September 14, 1955; in other words, the transaction where a man named Warren was known to have entered the premises without any liquor, un-tax-paid spirits, and left the premises with un-tax-paid distilled spirits. The purpose in telling the [179] court this, advising the court of this and opposing counsel, is to make certain that the court would not feel that it would be error to go into that and present it in the presence of the jury by merely questioning the witness.

Mr. Lavine: We would object to any introduction of any testimony about someone on the 14th which is not alleged in this indictment. The indictment alleges specific transactions. The dates are given specifically as the 15th of September, and any transaction prior thereto would be incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Let me have the file.

(Whereupon, the file was handed to the court.)

Mr. Bender: The Government can easily answer that objection because as your Honor knows in Federal court there are numerous cases——

The Court: It says, “on or about September 15th.” It doesn’t say on the 15th. It says on or about.

Mr. Bender: In fact, all we need prove is that it happened some time prior to the trial.

The Court: I think it is established by the evidence, without a doubt, that on the day the search was made the still was not in operation.

Mr. Bender: That is true.

The Court: No question about that. Now, if they convict [180] him of being a distiller or a rectifier they are going to have to show it was done prior to the 15th.

Mr. Lavine: Well, proof of any transaction on the 14th—I don’t understand from the Government’s offer of proof they are offering to prove there was any operation of the still on the 14th.

Mr. Bender: We are offering to prove, and intend to prove, he was engaged in this business——

The Court: What are you going to prove?

Mr. Bender: ——of a distiller as alleged in Counts Two, Three and——

The Court: What is your evidence? Was he a distiller on that day?

Mr. Bender: Your Honor, a man doesn’t have to

be operating his plant on one specific day in order to be——

The Court: Was he selling liquor?

Mr. Bender: That is it exactly. He possessed this large quantity. Like I indicated, we feel the evidence is sufficient, but out of an abundance of caution we feel the Government should introduce this additional testimony now.

Mr. Lavine: Well, I object to it as being incompetent, irrelevant and immaterial; not within the issues of this trial as to what was done in connection with someone else.

The Court: You go ahead, and you can make your objections and I will rule upon them. [181]

I asked for your authorities.

Mr. Lavine: 196 Cal., page 408. And 169 Cal., 408.

The Court: Both 408?

Mr. Lavine: Just a minute. I gave you the wrong one. 169 Cal. 408 and 196 Cal. 404, 405; and then under headnote 3. I haven't read these other two cases.

The Court: I will read these two.

Mr. Bender: Before counsel departs, the Government would like to object in that these are California citations. I would like to cite for the court *Opper vs. United States*, 3048 U.S. 84, and at page 93.

The Court: All right.

(Whereupon, the following proceedings were had in the hearing and presence of the jury and the defendant.)

The Court: Call your next witness.

Mr. Bender: The Government will call as its next witness Mr. Elroy W. Travis.

ELROY W. TRAVIS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Elroy W. Travis, T-r-a-v-i-s.

The Court: You will have to keep your voice up so the attorneys and the jury can hear you.

The Witness: Yes, sir. [182]

Direct Examination

By Mr. Bender:

Q. Mr. Travis, what is your profession or occupation?

A. Investigator for the Alcohol & Tobacco Tax Division, Internal Revenue Service.

Q. Directing your attention to on or about September 14, 1955, were you on duty that day?

A. Yes, sir.

Q. And were you in the company of any other agent or investigator? A. Yes.

Q. Who was with you at that time?

A. Investigator Jones and myself in one car and Investigator Coughran and Investigator Warner in another.

Q. And on that date, did you have occasion to go to the premises known as 1011 and 1011½ West 223rd Street, Torrance, California?

(Testimony of Elroy W. Travis.)

A. Yes, sir.

Q. What time did you arrive there?

A. Approximately 9:15 p.m.

Q. Will you relate what you observed occur, if anything, just five minutes prior and up to the time that you arrived at the premises, and subsequent to your arrival?

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial. [183]

The Court: Overruled.

The Witness: We followed a 1946 Ford coupe prior to his—to the coupe's driving into the west driveway, which is commonly called 1011½ West 223rd Street. The car was driven by one William J. Warren.

Q. After you followed this car which was driven into the premises on 223rd Street, what did you do then?

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: Will counsel please approach the bench?

(Whereupon, the following proceedings were had outside the hearing of the jury and the defendant.)

The Court: You know, I tried that case and the witnesses all testified that they did not see any liquor put in that car.

Mr. Bender: That is true, absolutely. But testi-

(Testimony of Elroy W. Travis.)

mony was introduced to show that the car left the premises and then the liquor was found in the car. Certainly no one at any time ever saw that man place the liquor in the car. It was never contended they did.

The Court: But none of the witnesses were ever able to testify that any liquor was put in the car at that place.

Mr. Bender: But they testified they checked the car before it was driven to that place and it contained no liquor.

The Court: Well, if we are going into that case and [184] retry it, we will be here a couple more days.

Is this the only testimony you have concerning the prior sales?

Mr. Bender: Yes, your Honor.

Mr. Lavine: I object to it, your Honor, as being incompetent, irrelevant and immaterial; not within the issues of this case. And the Government's own offer shows they don't have any evidence that is relevant to this case, and I submit that it is not proper and that it would be highly prejudicial to this defendant to bring in testimony about somebody arrested for a separate crime not charged in the indictment; at least not charged jointly in this case in any shape, manner or form, and we can't be prejudiced by the trial of somebody else, what somebody else did.

Mr. Bender: If counsel means that it will help establish defendant's guilt, he is correct. It is an

(Testimony of Elroy W. Travis.)

additional form of evidence. It is additional evidence of the defendant's guilt. As we stated earlier, we believe the evidence is sufficient now, but I think this should be introduced.

The Court: I think you had better be satisfied with what you have. You might be jeopardizing your entire case.

Mr. Bender: That is why I approached the bench before on the matter.

The Court: Well, I am going to sustain the objection.

(Whereupon, the following proceedings were had in the [185] hearing and presence of the jury and the defendant.)

The Court: The objection is sustained.

Q. (By Mr. Bender): Directing your attention, Mr. Travis, to on or about September 15, 1955, were you one of the investigators who participated in the arrest, or who was present on the premises of the Ramsey premises on September 15, 1955?

A. Yes, sir.

Q. Will you relate what you observed on the premises at that time which, if possible, you can testify to and that was not testified to by any of the other officers?

Perhaps I have overstated my question.

Will you relate what occurred on September 15, 1955, at the Ramsey premises?

A. After driving in the driveway I waited in the driveway until Investigator Jones started to-

(Testimony of Elroy W. Travis.)

ward the small building. Subsequent to that I approached the rear end of the house, of the living quarters, and met one of the investigators—I don't now remember if it was Investigator Warner or Investigator Coughran. We started—I went back in the rearmost part of the small house and observed Investigator Jones come out, and we walked toward the doorway of the garage, which has been described as the place where the distilled spirits were found. We got the odor or the aroma of what we thought was distilled spirits. And Mr. Awrey asked me to get the defendant with the keys. I immediately went into [186] the living quarters and asked the defendant for the keys to the garage.

Q. Did the defendant then hand you the keys?

A. No, sir, he did not.

Q. What did he do? A. He did nothing.

Q. What did you or anyone else say in his presence at that time?

A. I advised him that out of due respect to his property we didn't care to break the law; that actually his giving us the keys didn't really make any difference. However, I suggested he open it if he had the keys. At that time he walked out with Investigator Coughran. I remained in the house and had a conversation with the two women.

Q. What occurred after that that you observed?

A. Shortly thereafter at approximately 10 or 15 minutes later, I went back to the rearmost part of the premises and was looking around—that is, searching the various outhouses. And I returned

(Testimony of Elroy W. Travis.)

to the garage, the double-door garage, and at that time Investigator Awrey said that the defendant wanted to change his clothing. And I went with the defendant in his house while he was changing his clothes.

During the time I was in the house I asked the defendant—I advised him of his constitutional rights, and he replied that he was familiar with it, and words to the effect that he [187] was not an amateur. I told him that I wanted to ask him a few questions.

Q. What did he say?

A. Well, he didn't say anything after that.

Q. Did you say anything further?

A. I did not ask him any more questions that I can recall because I felt that there would be little co-operation.

After he had changed clothing we went back out to the house that has been described before with the double garage doors where the distilled spirits were found.

Q. For approximately how long was he in the house changing his clothing, if you can estimate?

A. Approximately half an hour.

Q. What did he wear, and what was he wearing before he went into the house to change his clothes?

A. As best I can recall, light-colored slacks.

Q. What did he change into?

A. He changed into a suit.

Q. After changing into the suit, what did he do and what did you do?

(Testimony of Elroy W. Travis.)

A. After the conversation in the kitchen, after that we walked out to the double-door garage premises where we found the distilled spirits where Investigator Coughran was there and——

Q. Had you found the distilled spirits before the [188] defendant went into the house to change his clothing? A. Yes, sir.

Q. Did you participate at all, or were you present at the time that Investigators Warner and Jones and Coughran testified that Government's Exhibits Nos. 1 and 2, the samples, were obtained?

A. No, sir, I was not there at the time.

Q. Continue. Relate what you did observe after you returned with the defendant on the outside.

A. In the presence of the defendant, Investigator Coughran and myself, the defendant made a remark that—not in the exact words, perhaps, that I am going to relate, but to the effect that he had a hunch that the 12-gallon deal was a phony.

Q. Did he state anything further?

A. No, sir.

Q. Were you present at any other conversations between the defendant, or in the presence of the defendant, which you have not testified to and which you specifically recall? A. Not that I recall.

Mr. Bender: You may cross-examine.

Cross-Examination

By Mr. Lavine:

Q. Mr. Travis, what time did you get there?

A. At the premises? [189]

(Testimony of Elroy W. Travis.)

Q. Yes. A. Around——

Q. On the 15th of September, I am talking about. A. 12:20, sir.

Q. 12:20? A. 12:20 p.m.

Q. Who else was with you at the time?

A. I was riding in the car driven by Investigator Coughran and accompanied by Investigator Jones.

Q. When you decided to go into these three garages you told the defendant that unless he gave you the keys you were going to smash down the doors, didn't you?

A. No, I did not, sir. I advised him that it was not necessary to have the keys, that we could break the doors down—that is, break the lock off the door.

Q. And did you have the search warrant with you at that time?

A. No, I did not have the search warrant.

Q. Did you think you had a right to break down the lock of the door without a search warrant for that specific building? A. No, sir.

Q. Did you tell the defendant that you would break the doors down? A. I did not. [190]

Q. Did you tell him that if he had any respect for his property he would let you have the keys?

A. No, sir. I said that with all due respect for his property we did not want to break the lock. He had hesitated in such a manner that he seemed to be reluctant—if he had any keys he made no remark that he was willing to open the door.

Q. And you then told him that if he had any

(Testimony of Elroy W. Travis.)

respect for the property there that he better open the doors, or words to that effect?

A. I did not say that. You are twisting——

Q. You were very gentle with him?

A. That's right, sir.

Q. Were you armed at the time?

A. We are always armed, sir.

Q. Had you taken any pickaxes out there or other weapons to break down locks and doors?

A. No, sir.

Q. Did you have any in the car at the time?

A. No, sir.

Q. Well, after you made that statement to the defendant that you say you made to the defendant, you went out with the defendant?

A. I did not go out with the defendant.

Q. Who went out with him? [191]

A. Investigator Coughran.

Q. Then did you join them later on?

A. Yes, sir. No, I did not join—as I recall, I did not join any of the investigators with the defendant prior to my going back into the house for him to change his clothing.

Q. How long did you stay out there that day?

A. We left around 3:30, or a quarter to 4:00.

Q. And had all of the things that were listed in this inventory been destroyed at that time?

A. I couldn't testify that all had been destroyed at the time. I remember what I destroyed.

Q. What did you destroy?

(Testimony of Elroy W. Travis.)

A. I remember destroying a 5-gallon water container of distilled spirits.

Mr. Lavine: I move to strike the "distilled spirits" as a conclusion of the witness, your Honor.

The Court: Is there any dispute that there was distilled spirits? When we originally started there was. But we have all this testimony now.

Mr. Lavine: As far as this 5-gallon container there is.

The Court: It may go out. Substitute "liquid" instead of "distilled spirits."

Q. (By Mr. Lavine): You didn't examine what was in this bottle, did you? [192] A. No, sir.

Q. You didn't take any sample of what was in this bottle? A. No, sir.

Q. You didn't, as a matter of fact, take any samples of any of the bottles that you destroyed, did you? A. No.

Q. And you didn't see anybody else take any samples of the bottles that they destroyed?

A. No, I did not.

Q. Now, you destroyed this 5-gallon bottle. What else did you destroy?

A. I punctured holes in the remains of the pot, the copper pot.

Q. And what else did you destroy?

A. A hydrometer, a thermometer and several barrels.

Q. You didn't see—pardon me. Are you through?

(Testimony of Elroy W. Travis.)

A. And several—not several but a few, more than three, I would say, of the gallon jugs.

Q. Were those empty gallon jugs?

A. They contained a liquid appearing to me as whiskey.

Q. Did you destroy all the empty jugs?

A. I didn't destroy any empty jugs.

Q. Did you take any jugs with you, yourself?

A. No, sir. [193]

Q. As far as you could see at the time you left, were all the jugs on the premises destroyed?

A. Well, I had no reason to believe that it was otherwise.

Mr. Lavine: That is all.

Redirect Examination

By Mr. Bender:

Q. Mr. Travis, did you see Investigator Awrey serve the search warrant on the defendant?

A. No, sir, I didn't.

Q. At approximately what time, in point of time, how long after you had arrived on the premises did you have this conversation with the defendant concerning the key?

A. Approximately five minutes to 1:00 or 1:00 o'clock—in the neighborhood of 1:00 o'clock.

Q. More than a half hour after you had been on the premises? A. Yes.

Mr. Bender: That is all.

(Testimony of Elroy W. Travis.)

Recross-Examination

By Mr. Lavine:

Q. You didn't see the defendant at any time operate any of the apparatus that you destroyed, did you?

A. No, sir; I didn't see him operate the still.

Q. You didn't see him handle any of the bottles or [194] jugs, did you, while you were on the premises on that date? A. No, sir.

Mr. Lavine: That is all.

Mr. Bender: No further questions of this witness, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Bender: The Government calls as its last witness John J. Linder, L-i-n-d-e-r.

JOHN J. LINDER

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: John J. Linder.

Direct Examination

By Mr. Bender:

Q. What is your profession or occupation?

A. Investigator for the Alcohol and Tobacco Tax Division, United States Treasury Department.

(Testimony of John J. Linder.)

Q. Do you have a position or capacity of being in charge of anything?

A. I am. I am the group leader of the enforcement officers, Los Angeles office.

Q. Directing your attention to on or about September 15, 1955, did you go to the premises known as 1011 or 1011½ [195] West 223rd Street, Torrance, California? A. I did.

Q. Did you go there in the company of Investigators Warner, Jones, Travis or Coughran?

A. I did not?

Q. Or Awrey? A. No, sir.

Q. What time did you arrive at the premises?

A. About 2:00 o'clock in the afternoon.

Q. What did you do upon your arrival at the premises?

A. I got in touch with Investigator Awrey here who had executed the search warrant. He was in charge. And I asked him what he had found, and he showed me the distilled spirits and the still and the other equipment, sugar and some malt.

Mr. Lavine: I move to strike the answer "distilled spirits" as a conclusion of this witness, your Honor.

The Court: Well, I think as far as this witness is concerned it may go out. He may testify he was shown some alleged distilled spirits.

Q. (By Mr. Bender): And you do so testify?

A. Yes, sir. I tasted it and smelled it and it tasted like whiskey to me.

Q. What did you do after that?

(Testimony of John J. Linder.)

A. I asked them who the man was from whom they had [196] seized it and they pointed out Milton Ramsey, who is sitting at the counsel table right there (indicating). And I talked to Ramsey about the equipment and the distilled spirits and the whiskey, as I know it. And he said it was his; it was his operation.

Mr. Lavine: I object to this voluntary statement of this witness. This witness is not being asked any of these questions.

Mr. Bender: Your Honor, in a government court——

The Court: Denied.

The Witness: And I asked him what——

Mr. Lavine: Just a moment. I object to any conversations. There has been no proper foundation laid; no showing that the statement was free and voluntary.

The Court: Well, I will sustain it upon the ground of improper foundation.

Q. (By Mr. Bender): Who was present at the time, other than yourself and the defendant, in this conversation?

A. Several of the other investigators were standing around there. I don't know which ones in particular.

Q. Approximately what time did this conversation take place?

A. I would say around 10 or 15 minutes after 2:00 in the afternoon of September 15th, 1955.

Q. Will you relate the conversation? [197]

(Testimony of John J. Linder.)

Mr. Lavine: I object to that as no proper foundation; no showing that it is free and voluntary; violation of the Fourth and Fifth Amendments of the Constitution of the United States.

The Court: Overruled.

The Witness: I asked Ramsey if these jugs of liquor belonged to him. And he said yes.

I said, "Does that still belong to you?"

He said, "Yes."

"How long have you been operating it?"

And he says, "For quite some time."

And I said, "Who do those two barrels back there belong to?"

He says, "Those are mine." And he showed me the method in which he aged the liquor that he put into this 50-gallon barrel.

I then asked him who owned a Studebaker automobile that was standing close to the driveway. He told me that one of his employee's or his mother's employee, a maid, owned the car. I went over and looked in the rider's compartment, in the small rear seat compartment. I saw nothing. I asked for keys to open up the trunk of the car and Ramsey said he didn't have them, that the maid had them.

I went in the house with Ramsey and talked to the maid, and she said she did not have a key for the rear of that [198] trunk. I asked Ramsey—

Mr. Lavine: I move to strike the last answer as hearsay, your Honor; not in the presence of the defendant.

(Testimony of John J. Linder.)

Mr. Bender: Yes, your Honor, the Government accedes to that.

The Court: Go on.

Q. (By Mr. Bender): Did you have a conversation with the maid?

A. I did. And Ramsey was there with me.

Mr. Bender: Oh. In that event the Government withdraws——

Mr. Lavine: I withdraw the objection if Ramsey was there.

The Witness: Ramsey was with me continually from the time I got there until—well, maybe for five or 10 minutes, to a period of about 5:00 p.m. on September 15, 1955, at which time I left him in the Office of the United States Commissioner. No, I took him up to the Marshal's office and left him there.

Q. (By Mr. Bender): What time did you leave the Ramsey premises?

A. About 3:30 to 4:00 o'clock.

Q. Have you now related all the conversation that you had with the defendant that you recall on September 15, 1955?

A. I asked him specifically why he used—what the malt was doing there, that particular can of malt.

He said, "That is something I add to the mash in the [199] stuff that I make here. It adds a little different flavor to it."

Mr. Lavine: Your Honor, may it be understood that my objection goes to all this conversation?

(Testimony of John J. Linder.)

The Court: Yes. You have a continuing objection. Same ruling.

Mr. Lavine: Violation of the Fourth and Fifth Amendments of the Constitution of the United States; no proper foundation laid as to its being free and voluntary.

The Witness: I then said to Ramsey—I then told Ramsey that I had never seen malt used in an illicit distillery since I had been a member of the Alcohol Tax Unit.

He said, “Well, this is one of my own ideas and I have worked it out myself. I am experimenting with it; have been for a long time. I have a good product here.”

And he then went on to relate to me that he had taken a gallon of this whiskey, and he used the term “whiskey,” and had given it to a man and a woman one afternoon and that they had drunk that entire gallon and the next day they got up, they felt good and didn’t have a headache due to his process of aging.

I then said to Ramsey, “Did you ever sell any of this stuff?” He said, “Yes.”

I says, “To whom did you sell it? I would like to have a list of your customers.” [200]

He says, “You got my big one last night.”

That conversation about the customer took place in the Studebaker automobile while Ramsey and I were in it on our way over to Torrance to have a locksmith pick the lock on the trunk of the Studebaker.

(Testimony of John J. Linder.)

Q. Was Ramsey with you when you took it to the locksmith's?

A. He was. He paid the bill. I think it cost a dollar and a half.

Q. Did you find any jugs or any substance which appeared to be liquor in the trunk of the Studebaker? A. No signs whatsoever.

Q. What did you do then?

A. We then drove back to the house.

Do you want me, counsel, to go on and tell all my relations with Ramsey that day?

Q. Just for the present time——

Mr. Lavine: Now, just a minute. I object to this witness' voluntary answers, your Honor.

The Court: Supposing you proceed, Mr. Bender.

Mr. Bender: Yes, your Honor.

Q. (By Mr. Bender): Mr. Linder, just staying now on September 15th for the present——

A. Yes, sir.

Q. ——What if anything did you do on those premises at [201] any time with reference to obtaining samples?

A. Shortly after I arrived there at 2:00 o'clock I looked into this room in which the two aging barrels were located, and a large quantity of liquid in gallon jugs that were stored in there. Ramsey was right there with me. I asked Coughran to help me fill up the jug, one of these one-gallon jugs, from this aging barrel. I then took one of the one-gallon jugs out of the cartons and I put them down on the ground. I smelled them. I knew what was in them.

(Testimony of John J. Linder.)

And then I marked the tops of them. I believe I put a "B" on the white cap of one, and that white cap is similar to the one that is on this exhibit here, that one-gallon jug. And I put a "C" on the other one; "C" meaning carton and "B" meaning barrel. I am not positive. I might have used other letters. But if I see the caps, I will identify them.

Q. Well, did Coughran tell you that he had participated in withdrawing some other samples earlier?

A. No. He didn't say anything to me.

Q. Did you on any other date or occasion have a conversation with the defendant subsequent to September 15, 1955? A. I did.

Q. When?

A. On Friday morning the 16th I talked to him over the telephone. He called the office twice.

Q. Did the person calling on the telephone identify [202] himself? A. He did.

Q. As who? A. As Ramsey.

Q. Approximately what time did this telephone conversation occur?

A. Well, one was in the morning and one in the afternoon. And then I had another conversation with him on Monday, in the morning.

Q. Can you recall the times of the conversations in the morning and afternoon on Friday?

A. Well, it would be between—both of them were between possibly 8:30 and 12:00 in the morn-

(Testimony of John J. Linder.)

ing; and 1:00 to 2:30, 3:00 o'clock in the afternoon on Friday; and between 9:00 and 12:00 on Monday morning.

Q. This person who called on Monday morning, did he identify himself as being the defendant?

A. He said, "This is Milton Ramsey."

And I said, "Well, I would like for you to come down. We would like to fingerprint you and photograph you."

Q. What did he say?

A. I think he said, "I am in my lawyer's office," at that time. And then in the afternoon—then he says, "Well, I'll see. I'll let you know."

Then in the afternoon he called back. Now, this conversation, [203] I think, took place on Friday in the afternoon. And I told him that I would like—and he again identified himself as Milton Ramsey, and he said, "I am sorry I didn't get to come over like you asked me to; but my lawyer told me not to, that I might open my big mouth and say something."

Mr. Bender: You may cross-examine.

Cross-Examination

By Mr. Lavine:

Q. You stayed how late, Mr. Linder?

A. Counsel, I left there between 3:30 and 4:00.

At the——

Q. And after you—pardon me. Go ahead.

A. ——request of Mr. Ramsey and his mother

(Testimony of John J. Linder.)

and his wife, I left between 3:30 and 4:00 in order to get him arraigned, because he, his mother——

Q. I just asked you the time. That was all.

A. 3:30 to 4:00.

Q. All right. Now, when you left you didn't take a couple of jugs with you that you initialed, did you? A. No, sir.

Q. And you sent somebody back later that afternoon to pick up those jugs, didn't you?

A. I did.

Q. And who was it you sent back?

A. Malcolm Warner and Jim Coughran. [204]

Q. And those two jugs were the same size as Government's Exhibits 1 and 2, isn't that right?

A. Well, let me see them. That's these gallon jugs, right?

Q. Yes.

A. With the white caps, similar to that? Yes.

Q. And they had caps on them similar to that, is that right? A. Right.

Q. You wanted those jugs because that was the only evidence that was left in that case, isn't that right? A. That is not true, counsel.

Q. Well, you knew when you sent somebody back that you didn't have any other jugs in your possession, didn't you?

A. I did not. I didn't have any in my possession at all.

Q. Well, you knew that the Government didn't have any in its possession, didn't you?

A. Yes, I did.

(Testimony of John J. Linder.)

Q. But you nevertheless sent somebody back to pick up two more jugs?

A. I sent them back to pick up the two that I had marked, because I asked Warner if he had them and he said, "I didn't. But Jones has got samples."

Q. Did he tell you that before you sent somebody back [205] to pick up those other two jugs?

The Witness: Say that again, Counsel.

Mr. Lavine: Read my question back, please.

(Question read.)

The Witness: No. I talked to Warner. Warner is the only man I had a conversation with. And in response to my question did he pick up those two jugs and mark on the caps, he told me Jones had two one-gallons in his car.

Q. (By Mr. Lavine): And you knew, didn't you, by the time you left, that everything else had been destroyed on the premises?

A. I did not.

Q. Weren't you present when the breaking up process took place? A. Partially.

Q. Well, you were there all of the time that they were breaking up the articles, weren't you?

A. No, counsel, I was not. I took Ramsey over to Torrance, and we were gone, I suppose, about 30 or 45 minutes.

Q. That was after——

A. I never made——

Q. ——all the articles were broken up, wasn't it? A. Oh, no, no.

(Testimony of John J. Linder.)

Q. Well, what time did you go over there?

A. I left with Ramsey about possibly 2:30, a quarter to [206] 3:00.

Q. Well, you never did get the two jugs with the caps on them, did you? A. No, sir.

Q. And the two jugs with the caps on them contained liquor in one jug from one barrel and liquor from another, from another barrel, is that right?

A. No, sir.

Q. Another container? What did it contain?

A. It contained liquor—or, one of them contained liquor from one of the barrels, or from the barrel, rather, the aging barrel; and one was out of a carton, a paper carton.

Q. Well now, you got very excited when you got back to your office and found that those two jugs weren't there, didn't you? A. No, sir.

Q. What time did you discover that the two jugs weren't at your office?

A. I met Warner over at our garage at 788 North Main Street and I said, "Did you get those jugs, or pick up those two jugs, one-gallon jugs that I filled with Coughran outside that room where the other whiskey was?"

And he said, "No."

I said, "Well, I poured those for samples."

He says, "Well, Jones has got samples." [207]

I knew then that there were two one-gallons missing somewhere, so naturally I sent them back out there for them.

(Testimony of John J. Linder.)

Q. You never save any more than two jugs for samples as evidence, do you?

A. Oh, yes, counsel. It's according to the way the set-up is.

Q. Well, did you see the inventory that afternoon? A. I never looked at it.

Q. When did you first look at the inventory?

A. If you show it to me now it will be the first time that I have looked at it.

Q. I see. Well, you didn't find any liquor in these automobiles, did you? A. No, sir.

Q. You nevertheless took the automobiles in, too, didn't you? A. Yes, sir.

Q. Now, how much liquid had you poured into each of these two one-gallon jugs?

A. Well, what I thought was a gallon. And I will show you about how far I poured them. That would be up to this break here, the shoulder, just at the top of the shoulder of this gallon jug.

Q. Who did you send back to pick up these two jugs that you said you had left there? [208]

A. Investigator Warner and Investigator James Coughran.

Q. What did you tell them as to where those jugs were when you sent them back?

A. I told them where I had left them; that it was right alongside that room where all the rest of these distilled spirits had been stored, on the ground.

Q. When you had left them there were there any other bottles there?

(Testimony of John J. Linder.)

A. Counsel, I don't know. I did not go back and inspect it at all.

Q. Well, when you poured the liquid you certainly saw whether there were any other bottles there, didn't you? A. I thought you——

The Witness: Restate his question, will you, please, sir?

(Question read.)

The Witness: Oh, yes. I thought you said when I left the premises were there any other bottles there. No. When I left those two one-gallon jugs there, there were quite a few of them inside the building.

Q. (By Mr. Lavine): Were they filled or were they empty?

A. Well, a few of them were filled. I don't know whether they were or not. I didn't even walk inside the place. [209]

Q. I see. And how many of them did you see were filled?

A. Counsel, I don't know. I filled two. And I don't know anything about any others except these two here; and those two that were left out there.

Q. You said you had some conversations with Mr. Ramsey after you got there? A. Yes, sir.

Q. Did you make some notes of those conversations? A. No.

Q. Did you make any notes about what you found on the premises? A. No, sir.

(Testimony of John J. Linder.)

Q. Did you make any notes of what jugs you filled? A. No.

Q. Or, if you did fill any? A. No, sir.

Q. Who did you leave on the premises at the time that you left there?

A. Now—when I left?

Q. What officers is what I am talking about.

A. What time I left there? I left there twice.

Q. I am talking about the time you finally left there.

A. Oh, well, I think Warner was there, and Travis and Awrey. Coughran was with me. He followed me downtown. And [210] I think Jones had already gone. I didn't pay much attention to who was there. Ramsey wanted to go down that night to be arraigned instead of being locked up in jail overnight, and I was accommodating him.

Q. Were these garages opened by the time you got there? A. Wide open.

Q. Now, you said you had a conversation on the telephone with somebody who gave the name of Ramsey. A. Yes, sir.

Q. And in connection with this conversation did somebody tell you you shouldn't substitute whiskey or substitute bottles of substance you know that all the bottles were broken? Was there some conversation to that effect on the phone?

A. No, sir.

Q. Didn't somebody say to you, in substance and effect "You left those bottles there, but those bottles were broken later on, and don't fake any

(Testimony of John J. Linder.)

whiskey here in the case''? Was there such a conversation on the phone?

A. No, no. That's not the conversation. I'll repeat that conversation.

Q. Well, I am asking you if there wasn't a conversation in substance and effect as to what I have stated to you?

A. No, counsel. I would like to repeat the conversation. [211]

Q. All right. Go ahead. Repeat it.

A. A man called and identified himself as Milton Ramsey.

Q. You had never heard this voice on the phone before, had you?

A. Twice before.

Q. When?

A. On Friday morning and Friday afternoon; and then on Monday morning.

Q. Outside of those times you had never heard this voice before?

A. No, sir.

Q. And you had never heard the defendant actually talk to you on the phone that you knew it was the defendant?

A. I will say it was Ramsey.

Q. Well, you say it was. But you never heard that voice before, had you, on the telephone?

A. Not before Friday morning.

Q. Was there some conversation now about the destruction of those two bottles and that there wasn't to be any faking of any evidence? Was there something said about it?

A. If you will give me the entire conversation,

(Testimony of John J. Linder.)

I will tell you the parts that I took part in, Counsel. I would like to relate the conversation.

Q. I wasn't there. I am just——

A. I was there. I will give you the entire conversation. [212]

Q. I am asking you if there was a conversation with relation, just the substance matter now, of faking evidence in this case?

A. There was nothing. That's right. Nothing.

Q. Were you in the Alcohol Tax Unit when the two officers that you sent out there to get those two bottles returned?

A. I am still working for the Alcohol Tax Unit, Counsel.

Q. I didn't say that you weren't. Were you present on September 16th, or 15th, the night of the 15th, when Officer Warner and another officer returned and told you that they couldn't get those two jugs?

A. No. I never saw them until the next morning on the 16th.

Q. Did they report to you the next morning that they didn't get those two jugs?

A. Warner said, "We couldn't find them." Warner told me that.

Q. Have you tasted the substance of either of those two jugs?

A. No, I haven't tasted it yet. I haven't smelled it yet. And I don't believe I have ever seen these before. I wouldn't be positive.

Mr. Lavine: That is all. [213]

(Testimony of John J. Linder.)

Redirect Examination

By Mr. Bender:

Q. Mr. Linder, at the time that you obtained the second samples did you know that Investigator Jones had what is now Government's Exhibits 1 and 2 in his car? A. I did not.

Q. Would you relate in full the telephone conversation between yourself and the defendant, the one that occurred on this Monday following the day of the arrest?

A. I answered the telephone and the man said, "This is Ramsey. I would like for you to come out to my house. I want to talk to you."

And I said, "Ramsey, you come in the office and talk to me. I don't want to go out to your house."

"Well," he says, "you fellows won't be able to do anything with me because you haven't got any samples of the liquor."

And I says, "Well, don't tell me we haven't got them because we have got them."

He says, "I've got the caps that you marked while I was standing there watching you, and I have given them to my lawyer. And we know that you fellows have a hard time getting along, and I don't want to cause you any trouble, and I will be willing to plead to a lesser violation than what I am charged with if it's all right with you." [214]

And I told him it wasn't.

(Testimony of John J. Linder.)

Q. Is that all the conversation?

A. That's it.

Mr. Bender: No further questions.

Recross-Examination

By Mr. Lavine:

Q. You made some notes of this conversation?

A. No, sir.

Q. Did you take a recording of it while it was going on? A. No, sir.

Q. And all you said to him in reply was that you weren't interested in any lesser plea, isn't that right?

A. I told him that the United States Attorney handles that business; I don't. I have nothing to do with it.

Q. I see. That is all you said in that conversation in reply? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Mr. Lavine: That is all.

Mr. Bender: You may step down.

(Witness excused.)

Mr. Bender: The Government rests, **your** Honor.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish [215] you that you are not to discuss this case with anyone and you are not to allow anyone to discuss it with you; and you are not

to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

You may now retire to the jury room. And will you retire as quietly as possible as this court is still in session.

(Whereupon the jury retired to the jury room.)

The Court: Mr. Bender, before you rest your case I want to ask a question or two.

Count Two of the indictment says that the defendant is carrying on the business of a distiller without having given bond. Don't you think there ought to be some evidence in this case that he hasn't given bond? Are you just assuming that he hasn't given bond?

Mr. Bender: Your Honor, there is a case cited in the requested instructions to the jury, cited by the Government.

The Court: Don't you have any evidence of the fact that he hasn't given a bond?

Mr. Bender: No, your Honor.

The Court: I assume he hasn't given a bond, but——

Mr. Bender: Your Honor, in *Rossi vs. United States*, 289 U. S. 89, it holds, in substance, that in a prosecution for carrying on the business of a distiller without having given bond the defendant has a burden of showing that he [216] executed the bond. It's similar to the——

The Court: Well, I am just calling that to your

attention. You think the burden is upon the defendant?

Mr. Bender: Yes, your Honor.

The Court: Now, in Count Three you say:

“* * * business of distiller and rectifier * * *”

and

“* * * did fail and refuse to give notice thereof as required by United States Code.”

Now, is the burden upon the defendant to prove that he gave the notice?

Mr. Bender: Yes, your Honor. I have not yet had the opportunity to look for a case, but the burden in this type of thing is on the defendant because it is an item peculiarly within the knowledge of the defendant, easily to be disproved, or easily to be proved if given notice, if in fact he did. It is analogous to the situation concerning whether the defendant paid the special tax.

The Court: The burden is then upon the defendant to establish that he paid? All you have to do is allege he didn't pay?

Mr. Bender: That's right, your Honor. The case on that is *Faraone vs. United States*, 259 Fd. 507. And, also, we would like to refer your Honor to Title 26 of the United States Code, Section 5649, which concerns the burden of proof in [217] cases of seizure of spirits. It is in accordance with the order in the *Faraone* case.

The Court: Count Six alleges that he did remove approximately 40 gallons of distilled spirits to a place other than the Internal Revenue bonded

warehouse. Assuming that the distilled spirits were made upon the premises, where was it removed to?

Mr. Bender: Out of the still into the jug. It's like the old case, your Honor—I don't recall the citation—where a person——

The Court: You mean removal from the still to the jug?

Mr. Bender: Yes, your Honor, like larceny of a cow. It was standing up and an individual came along and killed it, and it was held that just causing it to fall was sufficient removal for it to have been larceny.

The Court: Where is your authority, besides Bender?

Mr. Bender: I am sorry, your Honor. I don't have a case on that. There are a few aspects of this case which I have not researched, and that is one of them.

After all, a transportation, by the very definition of the word, doesn't require that it be transported any particular distance. If it were transported a foot——

The Court: That is true. But if it is distilled and placed in the barrel and jugs right there where is it removed to? [218]

Mr. Bender: It is removed from the still into the jug, your Honor. It had to be moved a few feet.

The Court: Tonight you had better get some cases on it.

All right, Mr. Lavine. You want to say something. I will hear you.

Mr. Lavine: Well, the court is so correct I

don't know what I can add. I don't want to get into an argument with the court when the court has the point of view that I think is correct.

Insofar as Section——

The Court: Well, before you start arguing you better make a motion. There is nothing before the court.

Mr. Lavine: Yes, I am going to make a motion. But your Honor has made some points to the Government, and it was with reference to those points that I am about to address myself.

Now, insofar as Section 5649 is concerned, which shifts the burden of proof, or attempts to shift the burden of proof to the defendant, it is the defendant's position that is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States. And I will cite some cases if your Honor wants to look at them. But I want to make my point in that respect.

The Court: Have you got a case which says that that particular statute is unconstitutional?

Mr. Lavine: No. But by analogy on the principle of [219] shifting the burden of proof on criminal cases to a defendant. There are cases on that point.

Now, at this time I wish to move for a judgment of acquittal as to each of the counts as specified in the indictment. The Government has conceded as to Count One.

The Court: I will grant the motion as to Count One.

Mr. Lavine: Now, as to the other counts, if the

court please, we urge a judgment of acquittal as to each of the counts, first on the grounds of the insufficiency of the evidence, all of which your Honor has heard; and on the further ground that insofar as the burden of proof is concerned under Section 5649, there being no evidence on the particular issues which your Honor has called to the Government's attention here, the evidence is insufficient to establish those particular counts.

And as to Section 5649 of Title 26, where it attempts to shift the burden of proof, there is an unreasonable relationship between the attempt to shift the burden of proof and the shifting thereof to the defendant on any grounds whatsoever.

In the case of *Morrison vs. California*, one of the leading cases—it's an alien land law case, in which the United States Supreme Court went into the details of the unconstitutionality of a statute of shifting the burden of proof to a defendant. I haven't got the citation here. [220]

The Court: I am not interested in theories. If any court has held that statute to be unconstitutional I will follow it. If it hasn't, I won't. Because many, many of these cases have been tried and have been affirmed on appeal. Now, if you have got a circuit court case in which it says that that statute is unconstitutional, I will be glad to follow it.

Mr. Lavine: No, your Honor, I have none as to this particular statute. I can only protect my record by making the motion and specifying the

grounds and calling your Honor's attention to the applicable law, aided by analogy or otherwise.

The Court: Have you specified all your grounds?

Mr. Lavine: No, your Honor. I also move to dismiss the indictment, and for judgment of acquittal, on the ground that the evidence in this case was unlawfully searched and seized in violation of the Fourth and Fifth Amendments of the Constitution of the United States. And in that respect the search warrant, although specifying "premises," is required under Rule 41(e) to specify with particularity the particular part of the premises which is to be searched. And in this case there was no specifications of any garage or garages or outhouses or any other place other than two houses, which the evidence in this case shows that the officers went to specifically. And, therefore, any search outside of those [221] for any purpose, whether it was for the distilled spirits or for any of the other things which they found, was beyond the scope of the search warrant.

Also, that even within the four corners of the search warrant the search was beyond its specific designation and specific scope; and therefore, the indictment, being in violation thereof of all the evidence in respect thereto, was in violation thereof and the case should be dismissed on that ground.

And with respect to that motion I also wish to move to strike from the evidence all of the exhibits of articles taken from the premises, or purportedly taken from the premises, as having been illegally searched and seized, and therefore in violation of

the Fourth and Fifth Amendments and Rule 41 of the Rules of Criminal Procedure, Federal Rules of Criminal Procedure for the District Courts of the United States.

And I also wish to move to strike all of the photographs, which is secondary evidence of articles which were destroyed after being seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: Your motion to strike is denied. And your second motion was made upon the question of unlawful search and seizure.

Mr. Lavine: Yes, sir. [222]

The Court: That is denied.

Your first motion, under Rule 29(b), I am going to take it under submission. I don't know whether to submit the matter to the jury. And I will hold in abeyance my decision on the first motion.

I am granting the motion only to Count One and I am taking the matter under submission as to the other counts on the first reasoning as given by Mr. Lavine. And the other two reasons he gives, I have denied.

The court will now stand in recess until 20 minutes after 3:00.

(Short recess.)

(Other court matters.)

The Court: Is it stipulated that the jury is present and in the box?

Mr. Bender: So stipulated. And the defendant is present in court.

Mr. Lavine: So stipulated, your Honor.

MARVIN W. REEVES

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Marvin W. Reeves, R-e-e-v-e-s.

Direct Examination

By Mr. Lavine:

Q. Mr. Reeves, what is your occupation?

A. I am a longshoreman.

Q. Where do you reside?

A. At 363-A West 227th Street in Torrance.

Q. On September 15, 1955, did you have occasion to go to an address on West 223rd Street in Torrance?

A. I did.

Q. At 1011, 1011½?

A. Yes, sir.

Q. And did you have occasion to go to the back of that place on that date?

A. I did.

Q. What was the occasion of your having gone to that house?

A. The occasion was to help clean up.

Q. And did you go to the back of the house to clean up?

A. Yes, sir.

Q. And when you went back there did you find a number of broken bottles?

A. I did.

Q. Now, did you find in addition to the broken bottles any bottles that contained any liquid?

A. I did. [224]

Q. And how many bottles did you find there containing any liquid?

A. Two.

Q. And what was the color of those two bottles?

(Testimony of Marvin W. Reeves.)

A. Well, they were brownish liquid.

Q. Did they both appear to be the same color?

A. One was darker than the other.

Q. In comparison to those two bottles on the table, did they resemble the bottles on the table? Did the bottles themselves resemble those two bottles on the table? A. Yes.

Q. What did the contents resemble?

A. Well, they were darker than this. One was much darker.

Q. And what did you do with the bottles?

A. I went in and asked my mother-in-law——

Q. No, just what you did with the bottles now?

A. Oh. I took them and threw them in with the other pile of glass.

Q. And then did you remove the glass somewhere? Did you put the glass in some box or container to be removed from the premises?

A. No, not at that time, no, sir.

Q. Well, did you later go to the place where you had piled all this glass, including these two bottles, with the [225] defendant Milton Grady Ramsey?

A. Yes, sir.

Q. And what did you or he do there at that time?

A. Well, I showed him these two that I'd thrown out there. They were marked.

Q. And were they empty at that time?

A. They were broken.

Q. Was anything removed from those two bottles? A. No. They were broken.

(Testimony of Marvin W. Reeves.)

Q. Well, was anything removed from the tops of the two bottles? A. The two caps.

Q. I show you now two caps and ask you if you saw those before?

A. Yes. These are the two caps that I threw out with the jugs.

Mr. Lavine: I now offer these two caps in evidence as Defendant's Exhibits next in order.

Mr. Bender: May the Government see them?

Mr. Lavine: Surely.

(Whereupon the articles were handed to counsel.)

The Court: They will be received in evidence.

The Clerk: Defendant's Exhibits B and C in evidence.

(The exhibits referred to were marked Defendant's Exhibits B and C and received in evidence.) [226]

Mr. Lavine: You may cross-examine.

Cross-Examination

By Mr. Bender:

Q. What time was it when you found the two jugs? A. Approximately 4:30.

Q. When you found them were they broken?

A. No, sir.

Q. What did you do with them after you found them?

A. I went in and asked my mother-in-law——

Q. Not what you asked——

A. ——the reason for them being out there.

Mr. Bender: If the court please, of course the witness is not permitted to testify to hearsay.

The Court: It may go out.

Q. (By Mr. Bender): What did you do?

Mr. Lavine: He testified what he did.

Q. (By Mr. Bender): Well, you had a conversation with your mother-in-law?

A. Yes. I then went back out and threw them in with the pile of glass that was there.

Q. And who is your mother-in-law?

A. My mother-in-law?

Q. Yes. A. Mae Ramsey.

Q. What is your relationship to this [227] defendant? A. Brother-in-law.

Q. Were they one-gallon jugs that you found?

A. Yes.

Q. Did they have any markings on the glass?

A. I didn't examine the glass.

Q. You say you broke them? A. Yes, sir.

Q. What did you break them with?

A. Threw them up in the air.

Q. Was the defendant present when you broke them? A. No, sir.

Q. Was Mr. Warner present at this time?

A. No, sir.

Q. Who was present?

A. Mr. Leslie Fassenfelt.

Q. How do you spell his last name?

A. F-a-s-s-e-n-f-e-l-t.

Mr. Bender: No further questions.

Mr. Lavine: That is all. Thank you.

The Court: You may step down.

(Witness excused.)

Mr. Lavine: I will recall Mr. Linder. [228]

JOHN J. LINDER

a witness called on behalf of the defendant, having been previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Lavine:

Q. Are these the two caps that you marked, Mr. Linder? I am referring now to Defendant's Exhibits B and C? A. They are.

Mr. Lavine: I have no further questions. You may cross-examine.

Mr. Bender: We have no questions.

The Court: Step down.

(Witness excused.)

Mr. Lavine: Mr. Drew.

EDWARD F. DREW

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name in full.

The Witness: Edward F. Drew.

Direct Examination

By Mr. Lavine:

Q. What is your official position, Mr. Drew?

A. Chief deputy clerk for the United States District Court, Southern District of California.

Q. In connection with the case of the United States [229] against Milton Grady Ramsey have you made a search for the search warrant and the return and any documents that were on it, the inventory that was filed with the court?

A. I have made a search for that search warrant, yes.

Q. And for the other documents that were filed, the return? Have you had a search made by your deputies?

A. I was only requested to search for the search warrant. I wasn't aware that there were other documents.

Q. Did you find the search warrant?

A. I did not.

Q. Did you see any return or any part of any return to the search warrant in any files in the clerk's office? A. I did not.

Q. You made that search at my request, did you not? A. I did.

Mr. Lavine: You may cross-examine.

(Testimony of Edward F. Drew.)

Cross-Examination

By Mr. Bender:

Q. When did you make the search?

A. Yesterday morning.

Q. And where would these documents normally be?

A. Normally they would be in our search warrant file or attached to the Commissioner's transcript, after his return to us by the United States Commissioner.

Q. Do you know where they are? [230]

A. I do not. That is, the search warrant. I do not know where that is. I know where the Commissioner's transcript is. That is in the file.

Mr. Bender: No further questions.

The Court: You may step down.

Mr. Lavine: Thank you, Mr. Drew.

(Witness excused.)

Mr. Lavine: The defendant rests.

Mr. Bender: May I have a moment, your Honor?

The Court: Yes.

Mr. Bender: Your Honor, the Government requests approximately a five-minute continuance in order to obtain Commissioner Hocke concerning the search warrant. We didn't know that there would be this testimony.

The Court: Well, what difference does it make? You stipulated you could use the copy that was

here and admitted to be the copy. What difference does it make?

Mr. Bender: Only the inference, your Honor, that is apparently made.

The Court: Mr. Drew said he checked with the Commissioner's file, didn't he?

Mr. Bender: He said he searched for the search warrant but didn't find it. He searched the clerk's office.

Excuse me one moment, please.

The Court: Where are the search warrants usually [231] returned? Are they returned to the clerk's office or the Commissioner's office?

Mr. Bender: I don't know. I have never had an opportunity to pursue them. It's only to explain to the jury what has happened to it, if there is an explanation.

The Court: Well, does it make any difference? You have been using the copy.

Mr. Bender: Yes, your Honor. The copy is in evidence. The Government has no rebuttal testimony.

The Court: Not only that, but I believe the defendant put it in evidence.

Mr. Bender: Yes.

Mr. Lavine: That is correct, your Honor. We couldn't find the original. We put the copy in evidence.

The Court: What difference does it make whether he had the original or the copy?

Mr. Lavine: Well, we tried to find the docu-

ments, your Honor. We haven't. That is why we produced the copy.

Mr. Bender: The Government has no rebuttal testimony, your Honor.

Mr. Lavine: I think it is time to take up the question of instructions and other motions, your Honor.

The Court: Yes, you might as well approach the bench.

(Whereupon the following proceedings were had outside the hearing of the jury and the defendant:) [232]

Mr. Lavine: At this time the defendant again renews his motion made at the close of the Government's case to dismiss the case on each of the counts specified for insufficiency of the evidence to prove the offenses charged, and also moves to dismiss the indictment and dismiss each of the counts of the information for violations of the Fourth and Fifth Amendments to the Constitution of the United States, and Rule 41 of the Rules of the District Court of the United States, Federal Rules of Criminal Procedure for the District Courts of the United States; and also moves to strike all of the evidence heretofore specified in connection with the illegal search and seizure in three out-buildings which were not a part of the address or addresses specified in the search warrant.

And I incorporate by reference all the other motions to strike other matters that are fully set forth. And may it be considered that the court consider

them as fully repeated at this time. Will you stipulate that it may be deemed that the court consider all the motions made at the close of the Government's case as repeated at this time?

Mr. Bender: So stipulated.

The Court: I will make the same ruling as made before, denying it upon the last two grounds and taking the first ground under submission.

(Whereupon the following proceedings were had in the [233] hearing and presence of the jury and the defendant:)

The Court: Mr. Bender, I would like you to make your opening statement at this time. Is 30 minutes for each side sufficient?

Mr. Lavine: If we can't say it in 30 minutes, we can't say it at all.

Mr. Bender: I didn't anticipate arguing it at this time.

The Court: You know what the facts are and you can state the facts to the jury, can't you?

Mr. Bender: Surely.

(Whereupon counsel for the Government made his opening argument to the jury.) [234]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, A.D. 1956.

/s/ DON P. CRAM,

Official Reporter.

[Endorsed]: Filed March 29, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 30, inclusive, contain the original

Indictment;

Motion to Suppress Evidence and Dismiss Case;

Verdict;

Motion for Judgment of Acquittal or in the Alternative for a New Trial;

Notice of Appeal;

Praecipe;

Affidavit for Enlargement of Time for Filing and Docketing Record on Appeal:

which, together with a full, true and correct copy of the Minutes of Arraignment and Plea, Minutes of

the Court for December 20, 1955; December 21, 1955; December 22, 1955; January 16, 1956; and 2 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 20th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No 15094. United States Court of Appeals for the Ninth Circuit. Milton Grady Ramsey, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 26, 1956.

Docketed: April 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15094

MILTON GRADY RAMSEY,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

DESIGNATION OF POINTS ON APPEAL

Comes Now Milton Grady Ramsey and designates the points upon which he intends to rely upon appeal:

I.

The evidence is insufficient to justify the verdicts. The verdicts are contrary to the law and the evidence.

II.

The Court should have granted the motions for judgments of acquittal on each of the counts in the indictment.

III.

Evidence was illegally searched and seized in violation of the Fourth and Fifth Amendments of the Constitution of the United States, and searched and seized evidence was illegally admitted as evidence in the trial of the case.

IV.

The search warrant and the return was not the property described in the search warrant.

V.

Section 5649, Title 26 of the U. S. Codes is unconstitutional as attempting to shift the burden of proof in a criminal case to the defendant; that will violate the Fifth Amendment to the Constitution of the United States.

VI.

Evidence regarding a "still" not specified in any search warrant was illegally admitted. The Court erred in admitting secondary evidence or photographs of articles which were destroyed by the Government after being seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States. The Court erred in denying the Motions to Strike the same. The Court erred in admitting evidence seized in three outbuildings which were not a part of the address or addresses specified in the search warrants.

VII.

The Court erred in instructions given and refused.

VIII.

The Court erred in the admission and exclusion of evidence in the trial of the case.

IX.

The Court erred in its definition of what constituted the "business of a distillery" on the date in question.

X.

The Court erred in admitting evidence regarding an unconnected apparatus which was called a "still."

/s/ MORRIS LAVINE,

Attorney for Appellant.

[Endorsed]: Filed June 20, 1956.

No. 15094

United States
Court of Appeals
for the Ninth Circuit

MILTON GRADY RAMSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California.
Central Division.

FILED

DEC - 3 1956

No. 15094

United States
Court of Appeals
for the Ninth Circuit

MILTON GRADY RAMSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court in and for the
Southern District of California, Central Di-
vision

No. 24515

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON GRADY RAMSEY,

Defendant.

GIVEN INSTRUCTIONS

Government's Instruction No. 1

(Count Two)

The Court is requested to please read Count Two
of the Indictment.

Given:

/s/ H.C.W. [1*]

Government's Instruction No. 2

(The statute which applies to Count Two)

In Count Two of the Indictment the defendant is
charged with a violation of 26 U.S.C. § 5605, which
provides in pertinent part as follows:

“Any person who shall carry on the busi-
ness of a distiller without having given bond
as required by law or who shall engage in or
carry on the business of a distiller with intent
to defraud the United States of the tax on the

spirits distilled by him, or any part thereof,
shall, * * *”

be guilty of an offense.

Given:

/s/ H.C.W. [2]

Government's Instruction No. 3

(The elements which the Government must prove
in Count Two)

In Count Two of the Indictment the Government must prove either that defendant carried on the business of a distiller without having given bond or that defendant carried on the business of a distiller with intent to defraud the United States of the tax.

Given:

/s/ H.C.W. [3]

Government's Instruction No. 4

(The burden of proof in re giving bond.)

In a prosecution for carrying on the business of a distiller without having given bond, defendant has the burden of showing that he executed the bond.

Given:

/s/ H.C.W.

Rossi vs. United States,
289 U.S. 89. [4]

Government's Instruction No. 5
(Count Three)

The Court is requested to please read Count Three of the Indictment.

Given:

/s/ H.C.W. [5]

Government's Instruction No. 6
(The statute which applies to Count Three)

In Count Three of the Indictment the defendant is charged with a violation of 26 U.S.C. § 5603, which provides in pertinent part as follows:

“Every person engaged in * * * the business of a distiller or rectifier, who fails * * * to give notice * * *”

shall be guilty of an offense.

Given:

/s/ H.C.W. [6]

Government's Instruction No. 7
(The elements of Count Three)

The Government must prove in Count Three that defendant engaged in the business of a distiller or rectifier and failed to give notice thereof.

Given:

/s/ H.C.W. [7]

Government's Instruction No. 8
(Count Four)

The Court is requested to please read Count Four of the Indictment.

Given:

/s/ H.C.W. [8]

Government's Instruction No. 9
(The statute which applies to Count Four)

In Count Four of the Indictment the defendant is charged with a violation of 26 U.S.C. § 5691, which provides in pertinent part as follows:

“Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, (or) retail dealer in liquors * * * and wilfully fails to pay the special tax as required by law, shall, * * *”

be guilty of an offense.

Given:

/s/ H.C.W. [9]

Government's Instruction No. 10
(Carrying on the business)

You are instructed that defendant may be convicted of carrying on the business of a wholesale or retail liquor dealer although there is no proof that he had a barroom or usual appliance of a liquor dealer.

Hood vs. United States,
7 F. 2d 45 (C.C.A. W. Va. 1925).

Evidence of a single sale is sufficient.

Spirits and Wines,

74 F. Supp. 626 (D.C. Minn. 1947);

United States vs. Hughey,

116 F. Supp. 649 (D.C. Ark. 1953).

Given:

/s/ H.C.W. [10]

Government's Instruction No. 11

(Proof of nonpayment of tax)

In the absence of proof to the contrary, there is an inference that the defendant failed to pay the special tax as required by law. The defendant has the burden of showing that the special tax was not paid.

Faraone vs. United States,

259 Fed. 507 (C.C.A. Tenn. 1919).

Given as modified.

/s/ H.C.W. [11]

Government's Instruction No. 12

(Count Five)

The Court is requested to please read Count Five of the Indictment.

Given:

/s/ H.C.W. [12]

Government's Instruction No. 13

(The statute which applies to Count Five)

In Count Five of the Indictment the defendant is charged with a violation of 26 U.S.C. § 5642, which provides in pertinent part as follows:

“Any person who violates any provision of section 5008(b) (that is, any person who possesses, sells or transfers any distilled spirits to which the immediate container thereof has not had affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or * * *”

otherwise indicating compliance with the chapter on Excise Taxes, shall be guilty of an offense.

Given:

/s/ H.C.W. [13]

Government's Instruction No. 14

(The elements of Count Five)

The Government must prove in Count Five (1) that the liquid was distilled spirits; (2) that the distilled spirits were possessed by defendant or sold by defendant or transferred by defendant, and (3) the immediate containers of the distilled spirits did not have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits.

Given:

/s/ H.C.W. [14]

Government's Instruction No. 15

(Definition of possession)

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing is in actual possession of it.

A person who although not in actual possession knowingly has the power to exercise dominion or control over a thing is in constructive possession of it.

If you find from the evidence beyond a reasonable doubt that the accused had actual or constructive possession of the distilled spirits described in the indictment, then you may find that such was in the possession of the accused within the meaning of the word "possession" as used in these instructions.

Given:

/s/ H.C.W.

Based on 14-G of General Instructions. [15]

Government's Instruction No. 16

(Count Six)

The Court is requested to please read Count Six of the Indictment.

Given:

/s/ H.C.W. [16]

Government's Instruction No. 17

(The statute which applies to Count Six)

In Count Six of the Indictment the defendant is

charged with a violation of 26 U.S.C. §5632, which provides in pertinent part as follows:

“* * * Whenever any person removes or aids or abets in the removal of, any distilled spirits on which the tax has not been determined or paid, to a place other than the Internal Revenue warehouse provided by law or conceals or aids in the concealment of any spirits so removed, * * *”

shall be guilty of an offense.

Given:

/s/ H.C.W. [17]

Government's Instruction No. 18

(Elements of the offense)

The Government must prove in Count Six:

- (1) That the liquid was distilled spirits.
- (2) That the tax has not been determined or paid.
- (3) That defendant removed or aided or abetted in the removal of said distilled spirits to a place other than the Internal Revenue warehouse, or that he concealed or aided in the concealment of any spirits so removed.

Given:

/s/ H.C.W. [18]

Defendant's Requested Instruction No. 1

This is a case of circumstantial evidence. Where circumstantial evidence is relied upon to prove the government's case the circumstances must not only

be consistent with guilt but irreconcilable with innocence, or the defendant is entitled to an acquittal.

Given:

/s/ H.C.W. [19]

Defendant's Instruction No. 2

If you have a reasonable doubt as to whether the liquid in the two bottles offered by the government in evidence as Government's Exhibits 1 and 2 came from the premises of the defendant, or from some other place you must acquit the defendant.

Given:

/s/ H.C.W. [20]

Defendant's Instruction No. 3

The burden of proof is upon the government to prove each and every element of its case beyond a reasonable doubt, or the defendant is entitled to an acquittal. With very few exceptions, that burden never shifts to the defendant. He is not required to testify, and his failure to do so raises no presumption against him.

Given:

/s/ H.C.W. [21]

Defendant's Instruction No. 4

Statements which officers claim were made orally by the defendant to them must be viewed with caution, and unless you believe that such statements were actually made you must disregard them.

Given:

/s/ H.C.W. [22]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 22, inclusive, contain the original

Instructions given to the Jury;

in the above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above case.

Witness my hand and seal of the said District Court this 3rd day of October, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: United States Court of Appeals for the Ninth Circuit. No. 15094. Milton Grady Ramsey, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division. Filed October 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of District Court and Cause.]

DEFENDANT'S INSTRUCTION No. 5

Words used in a law or statute are construed in their ordinary and accepted meaning and use. The word "business" as used in the statute has such a common meaning, being defined by Webster as "mercantile transactions," "a commercial or industrial establishment or enterprise." Unless you find that the defendant was so engaged you must acquit him of the charges of or requiring him to be in the business of a distiller.

Refused:

/s/ H.C.W.

DEFENDANT'S INSTRUCTION No. 6

The corpus delicti of a crime are its essential elements. They must be proved independent of any alleged statements or alleged admissions of the defendant, and before you may consider such alleged statements or alleged admissions. If the government has failed to prove the offenses independent of any such alleged statements or admissions you must acquit the defendant of such offenses.

Refused:

/s/ H.C.W.

[Endorsed]: Filed December 22, 1955, U.S.D.C.

[Endorsed]: Filed November 19, 1956, U.S.C.A.

No. 15094

In the
United States Court of Appeals
For the Ninth Circuit

MILTON GRADY RAMSEY,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

Opening Brief on Appeal

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California
Phone Trinity 3241
Attorney for Appellant.

FILED

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In the
United States Court of Appeals
For the Ninth Circuit

<div style="display: flex; justify-content: space-between;"><div>MILTON GRADY RAMSEY, vs. UNITED STATES OF AMERICA,</div><div style="text-align: right;"><i>Appellant,</i> <i>Appellee.</i></div></div>	}	No. 15094
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Opening Brief on Appeal

JURISDICTION

Jurisdiction is conferred by Title 26, Sec. 1291 and Rule 39a of Rules of the District Court of the United States.

STATUTES INVOLVED

Title 26, Sec. 5601. PENALTY AND FORFEITURE FOR POSSESSION OF UNREGISTERED STILL OR DISTILLING APPARATUS.

Every still or distilling apparatus not registered as required by section 5174, together with all personal property in the possession or custody, or under the control of the person required by section 5174 to register the still or distilling ap-

paratus, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5174, shall pay a penalty of \$500, and shall be fined not more than \$1,000, and imprisoned not more than 2 years.

Section 5175 reads as follows:

(a) REQUIREMENTS. — Every person engaged in, or intending to be engaged in, the business of a distiller, shall give notice in writing, subscribed by him, to the Secretary or his delegate, stating his name and residence, and if a company or firm, the name and residence of each member thereof, the name and residence of every person interested or to be interested in the business, and the precise place where said business is to be carried on; and if such business is carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. The notice shall also state a particular description of the lot or tract of land on which the distillery is situated, and of the buildings thereon, including their size, material, and construction, that said distillery premises are not on any qualified rectifying plant premises, and such additional particulars, as the Secretary or his delegate shall, by regulations, prescribe. In case of any change in the location, form, capacity, ownership, agency, superintendency, or in the persons interested in the business of such distillery, notice

thereof in writing, shall be given to the Secretary or his delegate. Every notice required by this section shall be in such form, contain such additional particulars, and be submitted at such time or times, as the Secretary or his delegate shall, by regulations, prescribe.

Section 5603 reads as follows:

Every person engaged in, or intending to be engaged in, the business of a distiller or rectifier, who fails or refused to give notice, as required by sections 5175(a) and 5271(a), shall pay a penalty of \$1,000 and shall be fined not more than \$2,000; and every person who gives a false or fraudulent notice shall, in addition to such penalty or fine, be imprisoned not more than 2 years.

Section 5606, reads:

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not more than \$5,000 and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises,

and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any party thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Section 5691, reads:

Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not more than \$5,000, and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard or enclosure connected therewith and

used with or constituting a part of the premises, shall be forfeited to the United States.

Section 5642 reads as follows:

Any person who violates any provision of section 5008(b), or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under such section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by such section, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by such section, or who places any distilled spirits in any bottle, which has been filled and stamped under such section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under such section to any container of distilled spirits on which any tax due is undetermined or unpaid, or who makes any false statement in any application for stamps under such section, or who has in his possession any such stamps obtained by him otherwise than as provided in section 5008(b)(2), shall on conviction be punished by a fine of not more than \$1,000, or by imprisonment at hard labor for not more than 5 years, or both. Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section and section 5644 (relating to the bottling of distilled spirits in bond).

Section 5632 reads as follows:

All distilled spirits found elsewhere than in a distillery or internal revenue bonded warehouse, not having been removed therefrom according to law, shall be forfeited to the United States. Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been determined or paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than as provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not more than \$5,000 and imprisoned not more than 3 years.

The Fourth Amendment to the Constitution of the United States, provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Rules of Criminal Procedure reads as follows:

SEARCH AND SEIZURE.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of the Act of June 15, 1917, c. 30, title VIII, §4.40 Stat. 226, and title XI, §22, 40 Stat. 230, as amended by the Act of March 28, 1940, c. 72, §8.54 Stat. 80; 18 U.S.C. §98.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause

for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlaw-

ful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition. This rule supersedes the Act of June 15, 1917, c. 30, title XI, §§1-6, 10, 11, 12-16, 40 Stat. 228, 229, 18 U.S.C. §§611-616, 620, 621, 623-626, and any other provision of chapter 30 of that Act inconsistent with this rule. It

does not modify any other act, inconsistent with this rule, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

Section 3107, Title 18, reads:

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to make seizures under warrant for violation of the laws of the United States.

Section 5314, of the Internal Revenue Code of 1954, reads as follows:

The Secretary, his assistants, agents, and inspectors, shall investigate and report violations of this chapter or of section 7302 to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and the Secretary, his assistants, agents, and inspectors, may swear out warrants before United States commissioners or other officers or courts authorized to issue warrants for the apprehension of such offenders, and may, subject to the control of such United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section

3041 of title 18 of the United States Code is hereby made applicable in the enforcement of this chapter and section 7302. Officers mentioned in section 3041 are authorized to issue search warrants under the limitations provided in chapter 205 of title 18 of the United States Code, and the Federal Rules of Criminal Procedure.

STATEMENT

This is an appeal from judgments of conviction on counts 2, 3, 4 and 5 of an indictment charging the appellant with violation of the Internal Revenue Code (Title 26) (1954 Internal Revenue Code), Sections 5606, 5603, 5691 and 5642. The appellant was sentenced to 2 years in the penitentiary and to pay a fine of \$500.00 on each of the counts, or a total of \$2,000.00.

Internal Revenue agents, having a search warrant for the premises located at 1011 and 1011½ West 223rd Street in Torrance, California, consisting of a small house (R. 42) in the morning of September 15, 1955, searched the two houses named in the warrant which was to search for un-tax-paid distilled spirits and found nothing in either house (R. 42 and R. 43). They then continued a search in the shed, garage and a third shed, some distance from the house. It was locked and they told appellant that unless he arranged to unlock it that they would break it down (R. 88).

In the various little houses, one of the officers noticed a hot water tank and a mash barrel. In the second shed he saw two 5 gallon bottles and cases with gallon bottles of a brownish liquor that had no strip stamps,

no indication that tax had been paid (R. 44 and R. 45). In the third building, or second shed, he found a still condensor (R. 45). No still was connected up or in operation. Nothing was assembled as a still (R. 49). The witness said he found parts that could have been used as a still.

“It actually wasn’t set up as a still, was it?

The Witness: That’s right.” (R. 49).

There was nothing connected, there was no gas connection, no water connection, there was no steam coming up, there was no mash made. The still was not in operation when they were there (R. 60). The search warrant only specified search for tax unpaid distilled spirits (R. 61), nevertheless went on to search the premises. They they destroyed barrels and paraphernalia and broke bottles (R. 64). From an oak keg, Officer James H. Coughran drew off one gallon (R. 75). He drew out one five-gallon jug (R. 79) then destroyed the barrel, and destroyed everything else on the premises except another jug. No one ever saw a still in operation, or assembled it to see whether it worked or whether it was in operation as a still (R. 85). There was a pot that was in a wooden crate (R. 85).

In their inventory, there were 38 gallons destroyed and only 40 gallons in the barrel. Five of the men were working (R. 89). In his inventory the officer listed 40 gallons destroyed and then scratched out 40 (R. 92).

When the officers left the premises, two bottles undestroyed were left and Officer Coughran was told to go back that evening and pick up the two bottles.

When he got back there the two bottles were not there. It was late in the afternoon. He does not know what happened to those two bottles (R. 95). It took about an hour to break up everything (R. 170-R.172). Marvin Reeves testified that on September 15, 1955, he had occasion to go back to the place to help clean it up and he found two bottles containing a liquid (R. 225) and he just threw them into the other pile of glass and destroyed them. He removed the two caps from the two bottles (Def. Exh. B & C). It was approximately 4:30 (R. 227). The two caps were marked and contained marks of John J. Linder, one of the Internal Revenue agents. The Clerk of the United States District Court was unable to find the search warrant or the affidavit in connection with it (R. 230). At the trial, two other bottles of purportedly whiskey, appeared, and it was claimed by the officers that they had taken those two bottles and put them in the safe. This conflicted with their inventory.

SPECIFICATION OF ERRORS

I.

THE DISTRICT COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE ILLEGALLY SEARCHED AND SEIZED IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND FAILING TO GRANT JUDGMENTS OF ACQUITTAL ON THAT GROUND.

II.

THE VERDICTS ARE CONTRARY TO THE LAW AND THE FACTS.

III.

THE COURT ERRED IN THE RULING ON ADMISSIONS AND EXCLUSION OF EVIDENCE IN THE TRIAL OF THE CASE.

IV.

THE COURT ERRED IN INSTRUCTIONS GIVEN AND REFUSED.

V.

THE STATUTES HERE INHERENTLY AND AS CONSTRUED AND APPRISED ARE UNCONSTITUTIONAL IN THAT THEY ARE TOO VAGUE, INDEFINITE AND UNCERTAIN TO FORM THE BASIS OF A CRIMINAL CHARGE.

I.

**THE DISTRICT COURT ERRED IN FAILING TO
SUPPRESS THE EVIDENCE ILLEGALLY
SEARCHED AND SEIZED IN VIOLATION OF
THE FOURTH AND FIFTH AMENDMENT TO
THE CONSTITUTION OF THE UNITED
STATES AND FAILING TO GRANT JUDG-
MENTS OF ACQUITTAL ON THAT GROUND.**

We were unable to find the affidavit at any time on which the search warrants were based. Such affidavits and search warrants have to allege, in writing, the fraud upon the revenue has been or is being committed upon or by the use of exactly specified and described location, and it must contain a description of the property to be seized.

The Fourth Amendment applies to search warrants issued to Internal Revenue officers.

Wagner v. U. S., 8 F. 2d 581.

You have to particularly describe the person and place to be searched and the person or thing to be seized.

The Fourth Amend. to the Const. of the U. S.

Belief of an officer is not sufficient for the issuance of a warrant.

U. S. v. Laechew, 298 F. 652.

A probable cause is not shown even by the smelling of the odor of fermenting mash.

Alveau v. U. S., 33 F. 2d 467.

See 24 OAG 685 on what must be stated and what must be set out in the search warrant.

Obviously, the search cause intended of the two houses where the officers went under the search warrant. When they found nothing they went to a place where they had no search warrant.

A search warrant authorizing search of the garage and the basement of a house is insufficient to permit a search of the entire building.

Poldo v. U. S., CCA 9 (55 F. 2d 866) ;

Byars v. U. S., 273 U. S. 28, 32;

U. S. v. Veedor, 246 U. S. 675.

The warrant must so describe the articles to be seized, that the officer's sole function is identification, not discretion and selection.

U. S. v. Smith, 23 F. 2d 929.

A search warrant containing no description of narcotic drugs to be seized was held invalid.

Rice v. U. S., 24 Fed. 2d 479.

A search warrant describing "ranch with small building used for residence, located about 5 miles in a westerly direction from named town should be crossed for insufficiency.

Farrell v. U. S., (CCA 9) 33 Fed. 2d 71.

The description of the premises as certain street number is insufficient to warrant a search and seizure of the property on the 4th floor of the building.

U. S. ex rel Sunrise Products Co., Inc. v. Epstein, 33 Fed. 2d 982.

In the instant case the warrant neither described the location later searched nor the specific things seized and destroyed.

Where a search and seizure is actually based on the purported warrant the government cannot contend that the warrant was unnecessary and that the prosecution was for a conspiracy and not a substantive offense.

U. S. v. Bosoni, 57 Fed. 2d 328.

(1) The motion to suppress the evidence on the grounds of illegal search and seizure therefore should have been granted and the motion for judgment of acquittal on the same ground should have been granted.

(2) The Fourth and Fifth Amendments, U. S. Consitution, provide "no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." There was no particularity of description of the place to be searched and there was no particularity of description of the things to be seized.

The section must be literally construed to safeguard the right of privacy.

Byars v. U. S., 273 U. S. 28.

Its protection extends to offenders as well as the law-abiding.

Weeks v. U. S., 233 U. S. 383;

Agnello v. U. S., 269 U. S. 220, 232;

U. S. v. Lefkowitz, 285 U. S. 452.

II.

**THE VERDICTS ARE CONTRARY TO THE LAW
AND THE FACTS.**

Evidence received in violation over and beyond the search warrant is improperly received.

U. S. v. Lee, 83 Fed. 2d 195.

The evidence is insufficient to support the verdicts and each of them. The evidence is contrary to the law. In count two of the indictment, the appellant was charged with "With carrying on the business of a distiller without having given a bond as required by U. S. Code Title 26, Sec. 5176 (a), and did engage in, carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him." Nowhere in the evidence does it show that the defendant carried on the "business of a distiller."

The Internal Revenue Code of 1954, while giving many definitions of many things, gives no definition of what constitutes the "business" of a distiller. Insofar as the statute fails to define what constitutes the "business" of a distiller, it is too vague, uncertain and indefinite to constitute criminal legislation and must fall under the due process clause of the Fifth Amendment to the Constitution of the United States.

In *M. Krause & Bros. v. U. S.*, 327 U.S. at 622, 90 L.Ed. 899, the Supreme Court said:

"A prosecutor, in framing an indictment, a court in interpreting the administrator's regulations, or a jury in judging guilt, cannot supply

that which the administrator failed to do by express word or fair implication. Not even the administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and, hence, likely to create criminal liability."

U. S. v. Resnick, 299 U.S. 207, 81 L.Ed. 127.

The cases that hold statutes that are too vague and indefinite to constitute criminal liability are legion. In *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888, the court held the word "gangster" to be too vague and indefinite to constitute standard of guilt. If the word "gangster" is too vague, what about the word "business" undefined? When is one in business? Is it engaging in commercial enterprise? Is it when he sells something for a commercial purpose? Is it when he has a store or front as the May Company, or Bullocks, or the Emporium? When does "business" begin and when does it end? The statute gives no definition. For other cases, see: *Connolly v. General Construction Co.*, 269 U.S. 385; *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81 65, L.Ed. 516.

But if we try to define "business" ourselves as something engaged as an occupation engaged in mercantile transactions or commercial enterprises, we fail to find one scintilla of evidence in this record to estab-

lish that the defendant engaged in any commercial enterprise. It is not shown that he ever made a single sale, or buy, or that there was anything financial connected. As far as the evidence goes, it might have been for his own personal use and for the use of his family. Then this count three necessarily fails, also because there is further no evidence that he engaged in or intended to engage in "the business of a distiller." There would then be no need to give any notice.

Count Four charged likewise carrying on the "business" of a rectifier. There is no evidence that he carried on the "business" of a rectifier. Who is, or who is not a rectifier, is not defined by the statutes. But in any event, there is no evidence however that he carried on the business of a rectifier.

Count Five charged possession of approximately 40 gallons of distilled spirits, which did not have affixed thereto a stamp denoting the quantity of distilled spirits and evidencing payment of Internal Revenue tax for it. In this connection the officers claim to have had 2 gallons of spirits which mysteriously appeared after the officers had turned in an inventory to the defendant stating that they had destroyed all of the spirits on the premises except 2 gallons, and the 2 gallons were left in two containers on the premises for which the officer later returned. They had been destroyed.

The question necessarily arises whether proof, if there is proof of 2 gallons, there is proof of 40 gallons of un-tax-paid liquor. We respectfully submit that it

is not and that there is a fatal variance between the indictment and the proof. Section 5642 of Title 26, reads as follows:

“Any person who violates any provision of section 5008(b), or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under such section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by such section, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by such section, or who places any distilled spirits in any bottle which has been filled and stamped under such section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under such section to any container of distilled spirits on which any tax due is undetermined or unpaid, or who makes any false statement in any application for stamps under such section, or who has in his possession any such stamps obtained by him otherwise than as provided in section 5008(b)(2), shall on conviction be punished by a fine of not more than \$1,000, or by imprisonment at hard labor for not more than 5 years, or both. Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section and section 5644 (relating to the bottling of distilled spirits in bond).”

This section does not forbid the *possession of the distilled spirits* in this case, which was charged in the indictment.

There were no 40 gallons in the two one-gallon jugs which were brought into court and placed in evidence. The defendant had not placed the liquid in these bottles—they were placed in the bottles by the agents themselves. This did not constitute a violation of Section 5642. Furthermore, there is no evidence whatsoever that the distilled spirits were not for the immediate consumption on the premises, or for preparation for such consumption.

We respectfully submit that the evidence is insufficient to sustain the judgments on each of the counts named.

III.

THE COURT ERRED IN THE RULING ON ADMISSIONS AND EXCLUSION OF EVIDENCE IN THE TRIAL OF THE CASE.

The court erred in admitting into evidence the various exhibits because they were illegally searched and seized and because there is no evidence that any of them were used in the “business” of a distillery.

We have previously cited numerous authorities under Point I.

IV.

THE COURT ERRED IN INSTRUCTIONS GIVEN
AND REFUSED.

The court refused Defendant's Instruction No. 5 which was proffered, reading as follows:

“Words used in a law or statute are construed in their ordinary and accepted meaning and use. The word ‘business’ as used in the statute has such a common meaning, being defined by Webster as ‘mercantile transactions’—‘a commercial or industrial establishment or enterprise.’ Unless you find that the defendant was so engaged you must acquit him of the charges of or requiring him to be in the business of a distiller.”

Since the statute gave no definition of what constituted “business” the defendant attempted to offer one from a dictionary. The court refused to give the instruction, hence the jury, like *Screws v. U. S.*, 325 U. S. 91, 107, was left without rudder or oar to guide it, on what constituted business under any construction and it had to guess at its own interpretation of the law. A defendant is entitled to have the jury given the instructions which define the essential elements of the case.

Screws v. U. S., 325 U.S. 91, 107.

V.

**THE STATUTES HERE INHERENTLY AND AS
CONSTRUED AND APPRISED ARE UNCON-
STITUTIONAL IN THAT THEY ARE TOO
VAGUE, INDEFINITE AND UNCERTAIN TO
FORM THE BASIS OF A CRIMINAL CHARGE.**

The court erred in denying motions for judgments of acquittal on the evidence in this case, which were made at the conclusion of both the Government's case and the defendant's case, upon each of the grounds specified. Rule 29 Rules of Procedure. We have previously pointed out the insufficiency of the evidence.

For which reasons, and each of them, appellant prays for reversals of each of the judgments.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant.

No. 15094
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MILETON GRADY RAMSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

JAN 31 1957

PAUL P. O'BRIEN, CLERK

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No. 15094
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MILETON GRADY RAMSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California. The jury found appellant guilty of the offenses contained in Counts Two, Three, Four and Five of a six count indictment which charged him as follows, in the counts wherein he was convicted: Count Two, with carrying on the business of a distiller without giving a bond and with intent to defraud the United States of the tax, Title 26, United States Code, Section 5176(a); Count Three, engaging in the business of a distiller or rectifier without giving notice, Title 26, United States Code, Sections 5175(a) and 5271(a); Count Four, carrying on the

business of a rectifier and failing to pay the special tax, Title 26, United States Code, Section 5081; and Count Five, with possession of distilled spirits which did not have a strip stamp affixed to the immediate container denoting payment of the internal revenue tax, Title 26, United States Code, Section 5008(b)(1).

The District Court had jurisdiction based upon Title 18, Section 3231, and this Court has jurisdiction to entertain the appeal and review the judgment under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

II.

STATEMENT OF THE CASE.

The jury found appellant guilty of possession of tax unpaid distilled spirits, and of engaging in the business of a distiller and rectifier without giving a bond, with intent to defraud the United States of the tax, without giving notice and failing to pay the special tax, in violation of the Internal Revenue Code of 1939, United States Code, Title 26, Sections 5008(b)(1), 5176(a), 5175(a), 5271(a), and 5081, respectively.

On September 15, 1955, a search warrant was obtained to search the premises located at 1011 and 1011½ 223rd Street, Torrance, California, for tax unpaid distilled spirits. The warrant was executed on said premises on the same date, shortly after noon, at approximately 12:20 p. m., by investigators from the Alcohol and Tobacco Branch of the Internal Revenue Service in Los

Angeles, California. The investigators found a total of approximately 40 gallons of tax unpaid distilled spirits on said premises. About 16 or 17 gallons were found in a barrel or rectifying still and about 23 or 24 gallons were found in case lots, in one gallon jugs. In addition, during the search of the premises for tax unpaid distilled spirits, the investigators found the unassembled component parts for one copper pot type still, 550 pounds of dextrose or corn sugar, five gallons of dextrose malt syrup, 26 oak barrels, and miscellaneous distilling equipment. Appellant admitted that he was the person named in the warrant. He was then placed under arrest on the premises during the search and subsequently indicted, tried and convicted of violations alleged in the aforesaid counts.

III. STATUTES INVOLVED.

1. The Government offered no evidence in support of Count One of the indictment because the still was not assembled or "set-up" when discovered. A motion for judgment of acquittal was granted as to this Count [Tr. p. 221].

2. Count Two of the indictment against appellant concerns a violation by him of United States Code, Title 26, Section 5176(a) which provides in pertinent part as follows:

"Every person intending to commence or to continue the business of a distiller shall, . . . execute a bond . . ."

3. Count Three concerns violations of United States Code, Title 26, Sections 5175(a) and 5271(a) which provide in pertinent part as follows:

“Every person engaged in, or intending to be engaged in, the business of a distiller, shall give notice”

[and]

“Every person engaged in, or intending to be engaged in, the business of a rectifier, shall give notice”

4. Count Four relates to a violation of United States Code, Title 26, Section 5081 which provides in part:

“Every rectifier of distilled spirits shall pay a special tax”

5. Count Five concerns possession of tax unpaid distilled spirits in violation of United States Code, Title 26, Section 5008(b)(1) which in pertinent part provides as follows:

“No persons shall possess, any distilled spirits, unless the immediate container thereof has affixed thereto a stamp evidencing the tax”

6. The jury acquitted appellant of the violation charged in Count Six of the indictment.

IV.

ARGUMENT.

A. The Trial Court Properly Denied the Motion to Suppress Evidence.

(1) The Search Warrant Was Valid.

Appellant was indicted on September of 1955; on October 31, 1955, the case was set for trial December 20, 1955; and on December 20, immediately prior to selection of the jury, appellant filed his written "Motion to Suppress Evidence and Dismiss Case."

The motion [Tr. pp. 6, 7] was argued by respective counsel. Appellant contended at that time that there was nothing wrong with the search warrant but that the search warrant provided for a search for illegally possessed spirits only and did not extend to a search for the other articles which were found on the premises while searching for alcoholic spirits [Tr. pp. 32-33].

As the validity of the search warrant was not questioned below, its validity cannot be raised for the first time on appeal.

(2) The Scope of the Search Warrant Provided for a Search of the Premises for Tax Unpaid Distilled Spirits.

Appellant alleged in said Motion to Suppress Evidence and Dismiss Case that the search warrant was obtained to search the premises for the tax unpaid distilled spirits only [Tr. pp. 6-7]. Appellant has correctly stated the full scope of the search warrant.

(3) **The Distilled Spirits Were Found on the Premises Upon Execution of the Search Warrant.**

Premises means the land and its appurtenances.

City of Newark v. Lippmin, 177 Atl. 556.

Premises includes the garage (dictum).

Cantrell v. United States (C. C. A. 5), 15 F. 2d 953, 954.

When the search warrant was issued, if it had been intended to limit its scope to a grant of authority to search the two houses only, the warrant could have so provided. Instead, it granted authority to search the premises.

In the *Cantrell* case the court discussed the garage as being a portion of the premises. Similarly, in the instant case, the sheds were on the premises and the discovery of tax unpaid distilled spirits thereon subsequent to display of the search warrant to appellant was not an unreasonable search and seizure but was pursuant to the express consent and authority conferred upon the investigators by the warrant.

Parenthetically, the metamorphosis from the position originally taken by appellant in arguing his motion to suppress evidence, is revealing. On the first day of trial but before commencement thereof, appellant conceded the validity of the search which resulted in discovery of the approximately 40 gallons of tax unpaid distilled spirits and only questioned the admissibility of anything else found on the premises such as a still. For example:

“The Court: Well, you admit now that the warrant is good as far as 40 gallons of un-tax-paid distilled spirits is concerned?

Mr. Lavine: That's correct . . .

The Court: They had a right to go in and get the 40 gallons of untaxed distilled spirits.

Mr. Lavine: That is correct."

The search of the premises and discovery of the tax unpaid distilled spirits occurred as follows:

There were two houses on the premises, "within the same enclosure" [Tr. p. 42]. The investigators entered the larger house at 1011, but did not remain very long because there was no odor of distilled spirits. Investigators Awrey and Jones made a quick survey of the smaller house on the premises with a similar result [Tr. p. 44]. Investigator Awrey then met Investigator Warner back of the little house near two sheds and a locked garage or shed on the premises [Tr. p. 44]. From the first shed there emanated a strong odor of fermentation; from the small garage or shed the odor of distillation was much stronger and included the odor of liquor [Tr. p. 44].

Investigator Travis requested the keys to the outbuilding from appellant who did not reply [Tr. p. 74]. Investigator Travis then advised appellant that out of due respect for appellant's property, they did not care to break the lock; that actually his giving the keys did not make any difference but that he should open it if he had the keys [Tr. pp. 192, 195]. Investigator Coughran, in the presence of appellant, told Investigator Travis to go ahead and knock the locks off. Appellant then produced the keys [Tr. p. 74] and unlocked the first shed [Tr. p. 106]. It contained some 50 gallon barrels, a water heater, a pump, a motor and some sacks of sugar [Tr. p. 106]. Then appellant unlocked the second shed which contained two five-gallon jugs containing a brown

liquid that smelled, and tasted like and had the appearance of whiskey [Tr. p. 106]. Proof that the liquid was distilled spirits is shown at length in IV B(4), *infra*.

Appellant stated the entire operation was his alone and had been going on about two or three months [Tr. pp. 106-107]. Appellant stated that he owned the still himself [Tr. p. 58].

The aforesaid circumstances adequately show that distilled spirits were found on the premises.

(4) Appellant Did Not Claim to Be an Occupant of the Premises so He Cannot Now Contend the Search of the Premises Was Unreasonable or Unlawful.

Where appellant does not claim he was an occupant of the premises searched he cannot contend the search of the premises was unreasonable or unlawful as to him.

Cantrell v. United States, supra.

Prior to and during the trial, appellant Ramsey introduced no evidence that he was an occupant of the premises in question and did not claim to be an occupant. To the contrary, when Investigator Warner asked appellant if he lived there he said, "No, I'm the gardener." [Tr. p. 105.] Accordingly, as in the *Cantrell* case, appellant may not affirmatively assert for the first time, on appeal, that he was an occupant of the premises and that the search was not made pursuant to a valid warrant.

(5) Evidence of the Component Parts of a "Still" and of Ingredients for the Making of Distilled Spirits Were Properly Discovered by the Investigators During Their Search of the Premises for Tax Unpaid Distilled Spirits.

The seizure of contraband material found on the premises during the course of a valid search for other material, is not obtained by an unauthorized search and seizure even though the officers are not aware the material is on the premises when the search is initiated.

Harris v. United States, 331 U. S. 145, at pp. 154-155.

In the *Ramsey* case, the investigators were on the premises searching for tax unpaid distilled spirits, pursuant to the search warrant. Both before and after they found distilled spirits, they found additional evidence that appellant was engaged in the business of a distiller or rectifier. Investigator Awrey testified that as soon as they found the tax unpaid spirits, appellant was placed under arrest; they did not know but what there were other distilled spirits on the premises so the search for distilled spirits was continued and further evidence of the other violations were found in the continued search for distilled spirits. Surely the investigators under those circumstances, would not be required to turn their backs on the evidence of commission by appellant of other offenses.

Evidence of the discovery of 550 pounds of dextrose or corn sugar, five gallons of malt, about 26 oak barrels, two rectifying stills, and the numerous unassembled component parts for a copper pot type "still" was all properly admissible having been discovered while the premises were being searched for tax unpaid distilled spirits.

The unassembled still and ingredients for making distilled spirits, were evidence that appellant was carrying on a distilling and rectifying business. This evidence was relevant, was not obtained in deprivation of any rights of appellant, and the trial court properly denied the motion to suppress the evidence thereof.

B. The Trial Court Properly Denied the Motions for Judgment of Acquittal.

(1) Only the Owner Who Affirmatively Asserts Ownership May Complain of Alleged Unlawful Search and Seizure of Property.

At no time before or during the trial in connection with his motions, or otherwise, did appellant affirmatively contend that he is the owner of the distilled spirits or other items seized. There was evidence, including defendant's admission, that he was owner, but he must have asserted ownership of the property to complain of alleged unlawful search and seizure thereof. The right to actual or constructive possession of the property allegedly unlawfully seized, must be asserted or the motion to suppress should be denied.

See:

Shore v. United States, 49 F. 2d 519.

(2) The Evidence Sufficiently Showed Appellant Was Carrying on the Business of a Distiller and Rectifier.

In addition to approximately 40 gallons of tax unpaid distilled spirits found on the premises [Tr. p. 79] the investigators discovered ingredients to make distilled spirits [Tr. p. 41], four mash barrels with oak chips [Tr. p. 46], a 100 gallon pot [Tr. p. 47], eight mash barrels used in the last month or so [Tr. p. 50], materials

there sufficient to make the mash [Tr. p. 60], a coil in a barrel [Tr. p. 64], the burner [Tr. p. 66], 3 barrels or 5 gallons or so of yeast [Tr. p. 102], several 100 pound bags of sugar [Tr. p. 157] totalling about 550 pounds [Tr. p. 81], and miscellaneous items such as a motor, purifier [Tr. p. 158], rectifiers, hose and electric motor [Tr. p. 83]. There were parts to assemble a complete still [Tr. p. 50].

In *United States v. 673 cases of Distilled Spirits and Wines*, 75 F. Supp. 622, where there was evidence of one sale, the Court held that it was a business. Appellant Ramsey, when arrested, said that he had a hunch that the 12 gallon deal was a phony [Tr. p. 194]. The reasonable inference is that appellant referred to a 12 gallon sale of distilled spirits by appellant. When asked if he had ever sold any, appellant replied, "Yes," [Tr. p. 204] and concerning his list of customers he stated, "You got my big one last night" [Tr. p. 204].

Out of the presence of the jury, the government stated that it considered the evidence sufficiently showed appellant was engaged in business, but that, out of an abundance of caution, it desired to prove a sale by testimony that a car driven by someone else and containing no distilled spirits, was driven on the premises in question and upon departure from the premises, the car was found to contain distilled spirits [Tr. pp. 185-191, incl., and in particular, pp. 187, 190]. Appellant objected on general grounds [Tr. p. 187] and that it was evidence of a separate crime [Tr. p. 190]. The objection was sustained.

However, proof of even one sale is not essential. In *Blinder v. United States Casualty Co.*, 257 Ill. App. 146, with no direct evidence of any sale, the Court found that

an apartment was being used to conduct a furniture business. In that case, there was furniture in the basement not being used in the apartment, the owner advertised furniture for sale, and furniture was coming and going out of the basement. Appellant Ramsey did not advertise in the newspaper but he had large quantities of liquor on hand, ingredients for distilled spirits were coming in and appellant admitted sales. Further, all of the various and necessary items of equipment and ingredients used in the manufacture of distilled spirits were present on the premises. The owner of the D & D Market testified that appellant purchased malt and yeast on two occasions through the D & D Market. The purchases were wholesale in nature. Appellant ordered the ingredients delivered to the market, which paid for them. Appellant reimbursed the market for its exact cost, without profit to the proprietor [Tr. pp. 99, 100-101]. *Cf.*, The two purchases were about three months apart and appellant stated he had been operating the still for a period of about two or three months [Tr. p. 106].

The government chemist testified that malt and yeast are ingredients for making distilled spirits [Tr. p. 138]. He further testified that there is no significant difference between corn and dextrose sugar for use as an ingredient in distilled spirits [Tr. p. 137]. The 550 pounds of sugar found on the premises is illustrative of the continuing nature of the enterprise unless the illogical assumption be made that sugar, dextrose sugar, in that quantity was possessed by appellant for innocent purposes.

Testimony concerning the ingredients and apparatus for making distilled spirits was offered into evidence for the purpose of showing that appellant engaged in the

business of a distiller or rectifier. It was properly received for this purpose.

Possession by appellant of approximately 40 gallons, of 320 pints of whiskey, on the premises without even any contention that such a large quantity was for personal consumption or use on the premises, is itself some evidence that appellant was engaged in the business of a distiller and rectifier. The ingredients and apparatus for making distilled spirits are further evidence showing that appellant was engaged in the endeavor.

All of the evidence, assuming no direct evidence of a sale, sufficiently showed that appellant was engaged in the business of a distiller or rectifier.

(3) Appellant Unlawfully Possessed Tax Unpaid Distilled Spirits as Charged in Count Five of the Indictment.

The scope of the search warrant is discussed in paragraph IV A(2) *supra*. The warrant authorized a search of the premises and the search disclosed distilled spirits. Among other things, appellant said the “still” belonged to him [Tr. p. 202], he had been operating it for two or three months [Tr. p. 106], had not operated it for about a month before apprehension [Tr. p. 162], that the malt found on the premises is something he adds to give it a little different flavor [Tr. p. 203], and four days after his arrest, he revealed his consciousness of guilt by the statement: “I will be willing to plead to a lesser violation than what I am charged with if it’s all right with you” [Tr. p. 216]. The liquor was in his constructive possession. He had the keys to the lock on the shed which contained the distilled spirits.

Actual or constructive possession was shown, as aforesaid.

The Government need not prove the nonpayment of the tax, for the matter is peculiarly within the knowledge of appellant.

Faraone v. United States, 259 Fed. 507 (C. C. A. Tenn. 1919).

Appellant offered no evidence that he had paid the tax or that strip stamps were affixed to any of the containers of the distilled spirits. The investigators testified there were no strip stamps [see Tr. p. 71].

Nonpayment of the tax was also adequately shown. Accordingly, there was ample evidence for the jury to find that appellant was guilty as charged in Count Five.

(4) There Was No Fatal Variance Between the Indictment and Proof.

With reference to Count Five only, appellant alleges a fatal variance between the indictment and proof (Op. Br. pp. 20, 21, 22).

Custody of the two samples of distilled spirits, of Government Exhibits No. 1 and No. 2, from acquisition to introduction into evidence, was clearly shown. Several investigators were present when Investigator Coughran obtained the samples [Tr. pp. 92, 107]. Exhibit No. 1 was an empty jug on the premises which Investigator Coughran filled as a sample with liquid from the rectifying barrel or still [Tr. pp. 89, 107, 159]. Exhibit No. 2 was taken by Investigator Coughran from a group of one gallon jugs which were in cartons in the shed and which contained a liquid which appeared to be liquor [Tr. pp. 85, 107, 156]. At this time, appellant was not present [Tr. pp. 124, 112, see also p. 109].

The investigators scratched their initials on the glass jugs, Exhibits No. 1 and No. 2 [Tr. p. 165] and Investigator Jones took them to the government car and locked them in the trunk [Tr. p. 160]. The next morning, he stored them in the government safe [Tr. pp. 161, 107]. Investigator Warner withdrew samples from Exhibits No. 1 and No. 2, to forward to the chemist in San Francisco [Tr. p. 108]. Exhibit No. 19 was taken from Exhibit No. 2 [Tr. p. 179] and Exhibit No. 18 from Exhibit No. 1 [Tr. p. 109] and Investigator Awrey mailed the two samples, Exhibits No. 18 and No. 19, together with another sample, to the chemist in San Francisco [Tr. p. 175]. Exhibits No. 1 and No. 2, the one-gallon jugs, remained in the government safe until taken to court on the day of trial [Tr. p. 109]. The chemist testified that in his opinion the contents of Exhibits No. 18 and No. 19 are distilled spirits [Tr. p. 137. Note, at page 136 the transcript erroneously refers to sample 18 as Exhibit No. 8, but the subsequent testimony and reference to Exhibit No. 18 reveals the error in transcription].

After the two samples, Exhibits No. 1 and No. 2, were obtained, marked, and locked in the trunk of a government automobile, as aforesaid, Investigator Linder arrived on the premises. He is the group leader [Tr. p. 200]. He did not know that Exhibits No. 1 and No. 2 had been obtained [Tr. p. 209] and were in Jones' car [Tr. p. 216]. Investigator Linder directed Coughran to help obtain samples for Linder [Tr. p. 205]. Investigator Coughran testified he is in no position to question what Investigator Linder orders [Tr. p. 92]. Investigator Linder marked the caps or tops of his samples [Tr. p. 206]. After destruction of the other material,

the two Linder samples were inadvertently left on the premises. Later, Investigator Linder sent Investigator Warner to obtain these samples [Tr. p. 209]. Investigator Linder learned from Warner that Jones had samples [Tr. p. 209]. Two investigators returned to the premises for the Linder samples [Tr. p. 211]. Investigator Linder had left his samples alongside the room where all the rest of the distilled spirits had been stored [Tr. p. 211]. Before the return of the investigators to the premises, the Linder samples were found, broken and intentionally destroyed by the brother-in-law of appellant [Tr. pp. 225-226].

The intentional destruction of the Linder samples is reprehensible but does not affect the guilt or innocence of appellant. The other samples, Government's Exhibits No. 1, No. 2, No. 18 and No. 19, clearly establish that the liquid found on the premises was distilled spirits.

Of the two one-gallon jugs full of distilled spirits which were introduced into evidence [Exs. No. 1 and No. 2] Exhibit No. 1 was filled by the investigator with liquid from a larger barrel, which appellant himself said contained about 16 or 17 gallons. The one gallon, Exhibit No. 1, which was so obtained, was proved to be distilled spirits. Surely, the remaining 15 or 16 gallons in the same barrel were distilled spirits.

The other one-gallon jug, Exhibit No. 2, was selected at random from a group of about 23 or 24 one-gallon jugs full of liquid resembling liquor. The contents of Exhibit No. 2, so selected, was distilled spirits. A reasonable inference for the trier of fact was that the contents of the other jugs was distilled spirits.

In any event, if there was a variance in proof between the 40 gallons alleged and two gallons proved, the variance did not affect the substantial rights of appellant and he was not taken by surprise by the allegation of approximately 40 gallons and introduction into evidence of two gallons.

Where an indictment alleged 8,301 grains of narcotics sold by defendant and the proof showed only 58½ grains, the variance was not fatal.

Cromer v. United States, 142 F. 2d 697, Cert. Den. 322 U. S. 760;

See also:

Berger v. United States, 295 U. S. 78, 82.

(5) Appellant Is Not Charged in Count Five With a Violation of Section 5642.

Appellant, on page 22 of his brief, alleges that Section 5642 of Title 26 does not forbid *possession of the distilled spirits*. This is patently correct. Section 5642 states only the penalty provided for a violation of Section 5008(b). It is the latter section, *i. e.*, 5008(b)(1), which prohibits possession of tax unpaid distilled spirits, as charged in Count Five of the indictment.

It is doubtful that appellant could have been misled by the references to Section 5642 in the caption of the indictment or elsewhere, as the body of Count Five clearly charges a violation of Section 5008(b)(1).

If appellant was misled, it is not a ground for reversal. An indictment is not defective merely because by inadvertence the wrong statute was referred to, because the statute forms no part of the charge.

Hoppet v. United States, 7 Cranch 389, 393.

The Indictment is sufficient if it charges in fact, an offense against the United States.

Williams v. United States, 168 U. S. 382, 389;

See also:

Johnson v. Biddle, 12 F. 2d 366;

Martin v. United States, 99 F. 2d 236;

Smith v. United States, 145 F. 2d 643.

(6) There Was No Stamp Affixed to the Immediate Container in Which the Distilled Spirits Were Found, Denoting Payment of the Tax.

Appellant apparently asserts on page 22 of his brief, that he did not place the liquid in the one-gallon bottles or jugs which are Government's Exhibits No. 1 and No. 2; that "they were placed in the bottles by the agents themselves" which bottles did not have strip stamps affixed thereto.

The evidence showed that Exhibit No. 2 was full of liquid when discovered and was taken from a group of one-gallon jugs full of liquid [Tr. pp. 85, 107, 156]. None of the jugs or bottles had strip stamps [Tr. p. 71]. Exhibit No. 2 had no strip stamp [Tr. p. 160]. The liquid contained in Exhibit No. 1 was originally found in a barrel which appellant himself estimated contained about 17 gallons. Accordingly, Exhibit No. 1, unlike the other jug in evidence, was filled by the investigator as an exemplar of the substance found in the larger barrel. There were no strip stamps found on the premises and no evidence offered to show payment of the tax. As dis-

cussed in the *Faraone* case, *supra*, the Government need not prove nonpayment of the tax.

The evidence all tended to show that appellant placed the distilled spirits in the various containers in which it was found. As an admission, he said the whole operation was his. If he did not personally fill the containers, he caused them to be filled and is equally guilty.

A person who causes an unlawful act to be done is guilty as a principal.

United States Code, Title 18, Sec. 2(b), and

Nye & Nissen v. United States, 168 F. 2d 846, 855; 336 U. S. 613, 620.

(7) An Affirmative Defense Must Be Raised During Trial.

Appellant further contends on page 22 of his brief, that "there is no evidence whatsoever that the distilled spirits were not for the immediate consumption on the premises, or for preparation for such consumption."

As stated in Section 5008(b)(1), there are several specific exceptions to criminal liability for possession of tax unpaid distilled spirits which containers thereof do not contain strip stamps denoting payment of the tax. All of these exceptions, including possession for consumption on the premises, are matters which must be raised during trial by way of affirmative defense. Appellant did not assert or attempt to assert this exception in the court below and cannot raise it for the first time on appeal.

See:

Scher v. Ohio, 305 U. S. 251.

C. The Court Did Not Err in Admitting the Exhibits.

As discussed before, tax unpaid distilled spirits were found by a lawful search of the premises. Evidence thereof was properly received.

Similarly, in the search for distilled spirits, additional evidence was discovered which further tended to show that appellant was unlawfully engaged in the business of distilling and rectifying. On authority of the *Harris* case, cited earlier, this additional evidence was properly admitted.

The numerous photographs of the extensive material found on the premises, taken prior to the destruction of the items, were material and relevant on both the issues of possession of distilled spirits and engaging in a business.

D. The Court Did Not Err in Instructions Given and Refused.

The jury was adequately instructed concerning the essential elements of Counts Two, Three and Four and appellant's proffered instruction number five was properly refused. Appellant's instruction was limited to defining business as meaning "mercantile transactions" and did not include all of the meanings of business. For example, one of the definitions given by Webster is employment. Employment does not necessarily import a rendering of services for another. A person may be employed about his own business.

Of course, Count Five prohibits “possession,” not “business” and the propriety of conviction and sentence of appellant on Count Five is not raised by appellant in connection with alleged refusal to give instructions.

E. The Statutes Involved Are Not Unconstitutional.

Appellant cites no authority and makes no argument in support of his assertion that the statutes are unconstitutional. Accordingly, it suffices to state that the assertion is categorically denied.

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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